280 N.C. App.—No. 2 Pages 131-300

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 4, 2022

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OF

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[2]Began 7 October 2021.

COURT OF APPEALS

CASES REPORTED

FILED 2 NOVEMBER 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

OSHA citation—notice of contest—timeliness—An email communication by a workplace principal (petitioner) seeking to contest an OSHA citation was not timely where it was sent fifteen months after petitioner participated in an informal conference and then received a proposed settlement agreement from a health compliance officer. Petitioner was given multiple notices of a fifteen-day window in which he could declare in writing that he was contesting the citation but took no steps to submit a written contest or to seek legal advice and he admitted that he did not read the notices carefully. The Commissioner of Labor (respondent) neither waived nor forfeited the defense of untimeliness where a district supervisor for the Department of Labor called petitioner a year later to ask about the status of the citation, and where respondent docketed the late email as a "notice of contestment." **Lost Forest Dev., L.L.C. v. Comm'r of Labor, 174.**

APPEAL AND ERROR

Interlocutory order—substantial right—risk of inconsistent verdicts—claims requiring different proof—In a case where a limited liability company (plaintiff) accused a consulting firm and its owner (defendants) of misrepresenting the costs of developing a residential subdivision project, plaintiff's appeal from an interlocutory order granting partial summary judgment in favor of defendants—

on plaintiff's claims for unfair and deceptive trade practices, fraud, and constructive fraud—was dismissed because the order did not affect a substantial right. Specifically, plaintiff's remaining claims for negligence, negligent misrepresentation, and breach of contract required different proof than the claims resolved on summary judgment, and therefore plaintiff would not face a risk of inconsistent verdicts on common factual issues in different trials. **Greenbrier Place, LLC v. Baldwin Design Consultants, P.A., 144.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning—cessation of reunification efforts—insufficient findings—In a neglect and dependency case, the trial court's order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the court failed to make adequate findings to support ceasing reunification efforts. The court made no finding that respondents had failed to make adequate progress in their family case plans, and all evidence showed the contrary, especially where respondents had fully participated in services to address past domestic violence, they had bonded well with the child during visits, and the department of social services (DSS) had dismissed a juvenile neglect petition as to respondents' infant son after monitoring him and allowing him to remain in respondents' care since birth. Further, the court made no finding that respondents refused to cooperate with DSS or the guardian ad litem (GAL) program, and its finding that respondents had not made themselves readily available to DSS or the GAL was not supported by the evidence. **In re A.W., 162.**

Permanency planning—guardianship to nonparents—fitness of parents—constitutionally protected parental status—insufficient findings—In a neglect and dependency case, a permanency planning order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the trial court made insufficient findings of fact supporting its conclusion that respondents were unfit or had acted inconsistently with their constitutionally protected status as parents. The court's findings focused on respondents' history of domestic violence, but there was no clear, cogent, and convincing evidence that respondents were presently unfit, especially where they had fully participated in services to address domestic violence, there had been no new incidents of domestic violence in the home since the juvenile petition's filing, and the child had a positive bond with respondents. Further, where a juvenile neglect petition regarding respondents' younger child was dismissed before the court entered the permanency planning order, the order failed to address why respondents were unfit to parent one child but not the other. **In re A.W., 162.**

CIVIL PROCEDURE

Denial of motion to dismiss—subsequent motion for summary judgment allowed—permissible due to different standards—The denial of motions to dismiss did not preclude a judge—whether the same or a different judge—from later allowing the same party's motion for summary judgment, because the two types of motions are evaluated under different standards and present separate legal questions. **Phillips v. MacRae, 184.**

CONSTITUTIONAL LAW

Juvenile tried as adult—prior to change in law—new law not retroactive—no flagrant violation of rights—Defendant was not entitled to dismissal of criminal charges under N.C.G.S. § 15A-954(a)(4) where he was prosecuted as an adult for acts committed when he was sixteen years old but a subsequently-enacted law—applied prospectively—raised the age at which offenders could be automatically tried as adults. Defendant could not show that his constitutional rights were violated, much less flagrantly violated, because the statute changes did not create a classification between different groups of people to trigger an equal protection violation, his prosecution as an adult did not criminalize a status which could implicate the Eighth Amendment prohibition against cruel and unusual punishment, and neither his substantive nor procedural due process rights were violated where being tried as a juvenile did not involve a protected interest and the State had a rational basis for updating statutes based on evolving standards of fairness. **State v. Garrett, 220.**

Right to impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses—In an involuntary commitment hearing in which no counsel was present for the State, the trial court did not violate respondent's procedural due process right to an impartial tribunal by questioning witnesses because there is no constitutional right to opposing counsel, there was no statutory requirement for the State to have an attorney present where respondent was being treated at a private facility, and the trial court did not advocate for either side during its questioning. **In re A.S., 149.**

CRIMINAL LAW

Jury instructions—attempted first-degree murder—prejudice analysis—There was no plain error in the trial court's jury instructions on attempted first-degree murder in defendant's prosecution arising from a shooting into an occupied vehicle. In the first place, the trial court was not required to repeat the same jury instructions for each count of the charge at issue. As for defendant's argument that the trial court plainly erred by using the general attempt and first-degree murder pattern jury instructions instead of the pattern jury instructions specifically on attempted first-degree murder, the appellate court concluded that, even assuming the trial court erred, defendant could not show prejudice under the plain error standard, where the jury found the necessary elements as to other charges for which defendant did not challenge the instructions and the challenged portion of the instructions did not go toward the crux of his defense (an alibi). **State v. Jones, 241.**

DIVORCE

Premarital agreement—real estate—consideration for acquisition—In a dispute over real property subject to a premarital agreement, the trial court erred in finding that the husband had provided all the consideration for the acquisition of the real property in the couple's holding company for investment real estate (POGO, which the husband and wife held in equal shares), where three properties had been originally titled to the husband and wife personally, two more were acquired directly by POGO through lines of credit and loans guaranteed by both the husband and wife, and another was contributed to POGO by the husband and then used to secure a cash-out mortgage guaranteed by both the husband and wife. **Poythress v. Poythress, 193.**

held that the outer walls, roofs, and gutters of each unit met the definition of "limited common elements" under the North Carolina Condominium Act (N.C.G.S. § 47C-2-102(4)). Therefore, under the terms of the condominium development's declaration, each unit owner was responsible for repairing and maintaining these elements on their respective units while the unit owners' association was required to insure these elements against fire, lightning, and similar perils. **Alexander v. Becker, 131.**

SEARCH AND SEIZURE

Investigatory stop—totality of circumstances—anonymous tip—evasive action—school property—The totality of the circumstances provided law enforcement officers with reasonable articulable suspicion to perform an investigatory stop on defendant where an anonymous caller had reported that a person matching defendant's description had heroin and a gun in his vehicle on school property; officers confirmed the details provided by the anonymous caller; a criminal database search revealed that defendant had a history of drug charges and a firearm charge; and defendant turned off and locked his car when an officer called his name, walked away from the officer, and reached for his waistband. **State v. Royster, 281.**

Motion to suppress—GPS tracking device on car—standing to challenge—common law trespass theory—The trial court in a heroin trafficking case properly denied defendant's motion to suppress because defendant lacked standing, under a common law trespass theory, to challenge the placement of a GPS tracking device on a car he drove for a trip to conduct a heroin transaction. Defendant did not own the car, but rather a potential drug buyer (the original target of law enforcement's investigation) had borrowed it from someone else and then allowed defendant to drive it—with the buyer riding as a passenger—to a source that sold heroin, and defendant could not claim rights in the car as a bailee where he offered no evidence of a bailment. Furthermore, the car's movements were tracked pursuant to a court order—which was supported by probable cause—within the time frame and geographical area authorized by the order. **State v. Lane, 264.**

Motion to suppress—GPS tracking device on car—standing to challenge—reasonable expectation of privacy—The trial court in a heroin trafficking case properly denied defendant's motion to suppress because defendant lacked standing to challenge a court order, supported by probable cause, allowing the placement of a GPS tracking device on a car he drove for a trip to facilitate a heroin sale. Specifically, defendant could not claim a reasonable expectation of privacy—as an overnight guest or regular visitor of a dwelling could assert a reasonable expectation of privacy in that dwelling—in a moving car on a public highway that he occupied only temporarily and for the limited purpose of conducting a single drug transaction. **State v. Lane, 264.**

Search warrant—probable cause—supporting affidavit—insufficient factual allegations—The trial court erred in a drug prosecution by denying defendant's motion to suppress evidence obtained from his house through a search warrant, where the affidavit in the warrant application did not allege sufficient facts to establish probable cause for the search. The affidavit alleged that police had previously observed a suspected drug dealer visiting defendant's house, followed the dealer's car after one of these visits, conducted a traffic stop, and found the dealer ingesting a white powdery substance; however, the affidavit did not state how long the dealer was inside the house, how much time had passed between when the dealer left the

N.C. COURT OF APPEALS

2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

ALEXANDER v. BECKER

[280 N.C. App. 131, 2021-NCCOA-582]

DAVID BAYNE ALEXANDER, ET AL., PETITIONERS
v.
DIANE K. BECKER AND THOMAS H. BECKER, CO-TRUSTEES OF THE DIANE K. BECKER REVOCABLE LIVING TRUST DATED DECEMBER 19, 2008, ET AL., RESPONDENTS

No. COA20-802

Filed 2 November 2021

Real Property—condominium development—walls, roofs, and gutters—limited common elements—responsibility to repair, maintain, and insure

In a legal dispute among owners of single-family units within a residential condominium development, it was held that the outer walls, roofs, and gutters of each unit met the definition of "limited common elements" under the North Carolina Condominium Act (N.C.G.S. § 47C-2-102(4)). Therefore, under the terms of the condominium development's declaration, each unit owner was responsible for repairing and maintaining these elements on their respective units while the unit owners' association was required to insure these elements against fire, lightning, and similar perils.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by Petitioners from judgment entered 25 August 2020 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 June 2021.

Alexander Ricks, PLLC, by Roy H. Michaux, Jr. and Ryan P. Hoffman, for Petitioners-Appellants.

The McIntosh Law Firm, P.C., by Christopher P. Gelwicks, for the Respondents-Appellees.

DILLON, Judge.

¶ 1 This matter involves a dispute among unit owners within a certain residential condominium development located in Mecklenburg County. The dispute concerns whether it is the unit owner's association *or* the unit owners respectively who bear the responsibility to maintain and insure the outer walls, roofs, etc. Essentially, certain owners of the small units contend that the responsibility falls to each unit owner,

while certain owners of the larger units contend that these structures are common elements and that the association bears the responsibility to maintain them.

I. Background

¶ 2 The Courtyard of Huntersville (the "Community") is composed of fifty-one (51) residential units. Unlike many other condominium developments, each unit in the Community is located in its own free-standing, single-family dwelling structure. In other words, the Community outwardly resembles a single-family, residential subdivision made up of separately owned, single-family homes. However, the Community is, *legally*, a condominium,[1] established under a Declaration of Condominium (the "Declaration"), which heavily mirrors the North Carolina Condominium Act (the "Condominium Act"). Therefore, the occupant of a single-family structure within the Community does not actually own the outer walls of his/her structure, but rather only the air and walls within the outer walls.

¶ 3 The individual owners belong to a unit owners' association (the "Association"), as contemplated in the Declaration.

II. The Dispute

¶ 4 This dispute concerns whether it is the Association's responsibility to maintain and insure the roofs, outer walls (including siding), and gutters outside the outer wall of each single-family structure, or whether the responsibility lies with each unit owner to maintain these outer structures serving the unit (s)he lives in.

¶ 5 The answer is meaningful economically to the unit owners as the structures are of different sizes. Some unit owners live in structures that are twice as big as the structures other unit owners live in. Petitioners are owners of some of the smaller units. They contend that it is the responsibility of each unit owner to maintain the building which houses his/her unit. The Association Board and other unit owners, though, take the position that it is the Association which is responsible for maintaining the structures such that the costs would be borne more equally among the unit owners.

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1. The term "condominium" is often understood colloquially to refer to a particular unit. However, the term *legally* refers to the condominium development as a whole. *See* N.C. Gen. Stat. § 47C-1-103(7) (2020). Accordingly, "condominium" as used in this opinion refers to a development as a whole. "Unit" or "condominium unit" refers to an individual unit within a condominium development.

¶ 6 In any event, the answer depends, at least in part, on how these real estate components (the roofs, outer walls, and gutters) are classified in the Declaration and the Condominium Act.

¶ 7 Specifically, under the Declaration, each property component within the Community is classified as *either* Unit Property *or* a Common Element.

¶ 8 "Unit Property" consists (with some exceptions) of the real estate within the outer walls of each unit, such as the interior walls or fixtures within a unit. A declaration *may* designate certain real property serving a single unit, but located outside the interior walls, as "unit property." For example, in the Declaration, a pipe leading to and serving a single unit is classified as unit property. Pursuant to the Declaration, it is generally the responsibility of each unit owner *to repair/maintain* the unit property designed to serve only his/her unit. For instance, each unit owner pays for the repainting of the interior walls in his/her unit. The Declaration, though, does provide that the Association bears the responsibility *to insure* such unit property against certain perils, such as fire. Therefore, if a building is struck by lightning and burns down, the Association insurance covers the reconstruction, not only of the outer shell of each building, but also the interior walls and most fixtures.

¶ 9 A "Common Element" is defined by the Declaration as any real property that is not unit property. This is consistent with the definition under the Condominium Act, which defines common elements as "all portions of the condominium other than the units." N.C. Gen. Stat. § 47C-1-103(4).

¶ 10 There is a subset of the common elements defined in the Declaration and the Condominium Act as "Limited Common Elements." Essentially, a common element designed for "the exclusive use of one or more but fewer than all of the units" is a "limited common element." For instance, the roof over a building that contains one or a few units within a development is a limited common element. However, if a common element is designed to serve *all* units, then that common element is not a limited common element. For instance, the club house and pool within a condominium development are common elements, as they are designed to serve *all* unit owners.

¶ 11 Unlike most condominium components, the limited common elements within the Community that are the subject of this action each serve only one unit. That is, no limited common element serves more than one unit. This is because each unit is housed within its own structure. No two units share the same structure.

¶ 12 Petitioners take the position that the outer walls, roof, and gutters of a building and serving a particular unit are limited common elements. As such, under the Declaration, the obligation to repair, maintain, and insure the roof, exterior walls (including siding), and gutters on a particular building falls on the owner whose unit is located within that building.

¶ 13 Respondents (and the Association Board) take the position that these components are common elements which do not fall within the subcategory of limited common elements. As such, the responsibility to repair, maintain, and insure falls on the Association as a whole, with the costs borne by all the unit owners through the payment of dues.

¶ 14 After a hearing on various motions, the trial court entered summary judgment for Respondents, essentially agreeing with the Association Board's position that the Association bears the burden of maintaining the structures. Petitioners appealed.

III. Standard of Review

¶ 15 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2020). We review an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

¶ 16 We have reviewed the record and briefs in this matter, and we conclude as follows:

> (1) the outer walls, roof and gutters on a building housing a unit are limited common elements pursuant to N.C. Gen. Stat. 47C-2-102(4);
>
> (2) the Association is responsible for insuring all limited common elements, including the outer walls, roof and gutters of each building, against "loss or damage by fire, lightning, and such other perils" listed under Article X of the Declaration, and that said insurance shall be "paid for by the Association as a Common Expense," as provided under Article X, Section 1(g);
>
> and

> (3) the responsibility to repair and maintain the walls, roof and gutters of a residential building is borne by the owner of the unit housed in that building. The Association has no responsibility to maintain and repair these components (except to the extent covered by insurance that the Association must maintain under Article X of the Declaration).

We so conclude based on the reasoning below.

A. Limited Common Elements

¶ 17 The outer walls, roof, and gutters do not fall within the definition of unit property as defined by the Declaration. Accordingly, they are common elements. The issue then becomes whether they are within the subset of common elements, known as limited common elements. (We note that there is a strong argument that the gutters are unit property as being a type of "pipe" serving a single unit. However, as explained below, even if they are properly categorized as unit property, the unit owners are still responsible for their maintenance and repair while the Association is responsible for insuring them.)

¶ 18 As it was developed after 1986, the Community is governed by the Condominium Act. *See* N.C. Gen. Stat. § 47C-1-102(a) ("This Chapter applies to all condominiums created within this State after October 1, 1986.") The Condominium Act defines a limited common element as any "portion of the common elements allocated by the declaration or by operation of G.S. 47C-2-102(2) or (4) for the exclusive use of one or more but fewer than all the units." N.C. Gen. Stat. § 47C-1-103.

¶ 19 It is undisputed that the outer walls, roofs, and gutters in question each serve fewer than all the units. In fact, they each serve one unit, as each building houses a single unit. Accordingly, the walls, roof, and gutters are limited common elements if *either* they are defined as such in the Declaration *or* if they are defined as such under N.C. Gen. Stat. § 47C-2-102(2) or (4).

¶ 20 It is not clear from the record that the outer walls, roofs, and gutters fall within the definition of limited common element as set forth in the Declaration. The Declaration does include within the definition of limited common element those "bearing walls" and "fixtures" which lie "partially within and partially outside the designated boundaries of a Unit" and which serve only one unit. However, the gutters, roofs, and siding seem to be located completely outside the boundaries of the unit

and, therefore, do not fall within the Declaration's definition of limited common element.

¶ 21 Nonetheless, the outer walls, roofs, and gutters do fall within the definition of limited common element as defined in Section 47C-2-102(4). That statute includes within the definition of limited common element "all exterior doors and windows *or other fixtures designed to serve a single unit but located outside the unit's boundaries*" unless the declaration provides otherwise. *Id.* (emphasis added). In other words, each exterior fixture[2] serving a single unit is a limited common element unless that fixture is otherwise defined as something else in the declaration. If the declaration is silent regarding the classification of a type of exterior fixture serving a single unit, then the fixture is deemed a limited common element by virtue of Section 47C-2-102(4).

¶ 22 Here, the Declaration does list various components of the real property that are to be regarded as limited common elements. The Declaration, though, does not expressly categorize the exterior walls, roofs, or gutters or otherwise contain language that limits the definition of limited common elements to those components expressly mentioned. Accordingly, they are limited common elements by operation of Section 47C-2-102(4). *See* N.C. Gen. Stat. § 47C-1-103(13) (defining "limited common elements" as those common elements listed in Section 47C-2-102(4)).

B. Insurance Obligations

¶ 23 Since the outer walls, roofs, and gutters are limited common elements, the Declaration puts the onus on the Association to insure them against certain perils. Specifically, Article X of the Declaration[3] states as follows:

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2. Chapter 2 of *Webster's Real Estate Law in North Carolina* recognizes that fixtures include any chattel affixed to the land, which can include a building or parts thereof. Our Supreme Court has recognized that a building can be a fixture if there was an intent at the time it was built to become part of the land upon which it was erected. *See Lee-Moore v. Cleary*, 295 N.C. 417, 420-21, 245 S.E.2d 720, 722-23 (1978).

3. Appellants reproduced Article X of the Declaration as an exhibit to their brief. Our dissenting colleague correctly notes that only portions of the Declaration – which do not include Article X – were included in the record on appeal that is before us. We note, however, that the Declaration in its entirety is recorded in the Mecklenburg County Register of Deeds. We, therefore, take judicial notice under N.C. Gen. Stat. § 8C-1, Rule 201(b) (2020) of the Declaration, including Article X, as recorded. *See In re Hackley*, 212 N.C. App. 596, 601, 713 S.E.2d 119, 123 (2011) (taking judicial notice of a recorded deed, a copy of which was attached as an exhibit to the appellant's brief).

> Section 1. Fire and Extended Coverage Insurance. The Board shall have the authority and *shall obtain insurance for all buildings*, *structures*, *fixtures* . . . *constituting a part* of the Common Elements, [and] *the Limited Common Elements* . . . against loss of damage by fire, lightning, and such other perils as are ordinarily insured against by standard extended coverage endorsements, and all other perils which are customary covered with respect to projects similar in construction, location and use[.]

(Emphases added.)

¶ 24 Petitioners argue that the gutters are actually Unit Property rather than limited common elements. Specifically, Petitioners point to Article V of the Declaration, which includes within the definition of unit property "pipes" that serve "only one unit" whether "located inside or outside the designated boundaries of a Unit[.]" Petitioner contends that a gutter is a "pipe" as contemplated in this definition. We disagree. However, even if Petitioners are correct, Article X of the Declaration requires that such unit property also be insured by the Association:

> This insurance shall also . . . provide coverage for built-in or installed improvements, fixtures and equipment that are part of a Unit[.]

¶ 25 Further, Section 1(g) of Article X requires that the insurance "be paid for by the Association, as a Common Expense."

¶ 26 The unit owner, though, is not prohibited by the Declaration from obtaining insurance for the same loss, though the insurance purchased by the Association shall "be primary[.]" Article X, Section 1(j).

C. Repair and Maintenance Obligations

¶ 27 Even though the Association has the obligation to provide insurance coverage for the exterior walls, roofs, and gutters against certain perils, the Declaration provides that the unit owners respectively are responsible for their repair and maintenance. Specifically, Article VIII of the Declaration directs that the unit owners respectively are responsible for the repair and maintenance of any limited common element serving his/her unit *except for* the two parking spaces outside each unit serving that unit, each unit's private exterior entrance, and each unit's front porch.

¶ 28 And assuming that the gutters are unit property, it is still the unit owner who is responsible for their repair under Article VIII.

V. Conclusion

¶ 29 We conclude that the exterior walls, roof, and gutters on each residential building are limited common elements. We conclude that the Association must maintain insurance for these elements against certain perils as provided in Article X of the Declaration. As such, the Association may collect dues to pay for this insurance. We also conclude that each unit owner is responsible for the repair and maintenance of these elements serving his/her unit.

¶ 30 We, therefore, affirm in part and reverse in part the trial court's order and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge ZACHARY concurs.

Judge HAMPSON concurs in part and dissents in part.

HAMPSON, Judge, concurring in part and dissenting in part.

¶ 31 I agree with the majority opinion that this matter must be remanded to the trial court for further proceedings. I also tend to agree with the majority opinion, at least on the limited Record before us, the repair and maintenance obligations for the condominium units fall on the individual unit owners. I dissent in limited part, however, based on the scope of the remand and, specifically, as it relates to the insurance coverage obligations.

¶ 32 The majority opinion hits on what I perceive as the key issue in this case: the interplay of the Condominium Declaration and the Condominium Act. Specifically, the question is whether the Declaration at issue here was intended to supplement the provisions of the Condominium Act or, alternatively, to vary from the provisions of the Condominium Act. My supposition, given the individualized nature of the condominium units here—more in the nature of stand-alone single-family dwellings—is that the original intent was to modify and vary from the Condominium Act's provisions to accommodate the fact these units operate more as single-family residences than as traditionally imagined "condos." The problem, however, is that absent from the Record before us, and thus presumably before the trial court, is a full

version of the Declaration from which to be sure. The parties instead rely only on excerpts (and incomplete ones at that) to argue for their respective positions. For example, we are provided with multiple copies of Article VI titled Common and Limited Common Elements, which simply cuts off in mid-sentence while defining Limited Common Elements. Therefore, I am unsure what the rest of this Article says let alone intends. Thus, any supposition about the intent of the Declaration on the Record before us is just that: supposition.

¶ 33 Relatedly, the parties fail to engage on the underlying legal question: to what extent a Condominium Declaration may vary the terms of the Condominium Act. Ultimately, then there are two central questions left unanswered here: (1) does the Declaration supplement the provisions of the Act or attempt to vary from the provisions of the Act; and (2) if the Declaration varies from the Condominium Act (rather than supplementing the Act), does it do so in a way that is consistent or permissible under the Condominium Act?

¶ 34 In the absence of answers to these two questions, entry of judgment in this matter was premature. Consequently, I would simply vacate the trial court's Judgment in full and remand this matter to permit further proceedings.

JOSEPH R. BAZNIK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALFRED RODRIQUEZ INOA, A DECEASED MINOR, PLAINTIFF

v.

FCA US, LLC, DOZI ULASI, JR., JOSEPH E. HOPKINS, CAROL C. MELNICK, TODD WHITAKER, AND MILLARD S. WHEELER, DEFENDANTS

No. COA20-392

Filed 2 November 2021

Immunity—public official—DOT employees—no statutory basis

Employees of the Department of Transportation (NCDOT) (engineers and a sign supervisor) who were sued individually and in their individual capacities in connection with a fatal automobile accident were not public officials and thus were not entitled to public official immunity. The statutes cited by the NCDOT employees in support of their argument merely granted statutory responsibility to NCDOT and did not create their positions within NCDOT.

Appeal by Defendants from order entered 27 January 2020 by Judge Andrew T. Heath in Wake County Superior Court. Heard in the Court of Appeals 28 April 2021.

Whitley Law Firm, by Ann C. Ochsner; Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams, Margaret S. Abrams, and Melissa N. Abrams, for Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for Defendants-Appellants.

WOOD, Judge.

¶ 1 The sole question upon review is whether the trial court erred in denying Defendants' motions to dismiss. We affirm the order of the trial court.

I. Background

¶ 2 On August 5, 2018, Plaintiff's child Alfred Rodriguez Inoa ("Alfred"), a minor, was traveling as a passenger in a 2007 Chrysler 300 (the "Chrysler") and came upon the intersection of U.S. Highway 401 (Louisburg Road) and Fox Road located in Wake County. Upon reaching an intersection with U.S. Highway 401, eastbound passengers on Fox Road are required to cross a total of seven lanes and a median divider (the "Intersection") to continue to travel on the road. In violation of both national and state sight distance standards, the northwest corner of the Intersection had both manmade and natural objects such that an eastbound driver on Fox Road could not see a southbound vehicle approaching on U.S. Highway 401. While driving through the Intersection, the Chrysler carrying Alfred was struck by another vehicle in the rear driver's side. Though Alfred survived the initial impact of the collision, a defect in the Chrysler's fuel system caused the fuel to ignite and the Chrysler to immediately catch on fire. Alfred was trapped inside the Chrysler during this time resulting in severe injuries and ultimately his death.

¶ 3 On May 28, 2019, Plaintiff brought suit on behalf of Alfred's estate naming the following North Carolina Department of Transportation ("NCDOT") employees as Defendants both individually and in their individual capacities, Carol C. Melnick as a Division Traffic Engineer with NCDOT, Todd Whitaker as a Division Sign Supervisor with NCDOT, and Millard S. Wheeler as an engineer with NCDOT (collectively, the

"Defendants"). Plaintiff alleged Defendants all contributed to the construction of the Intersection. Defendants each filed a motion to dismiss under North Carolina Rules of Civil Procedure Rules 12(b)(1), (2), and (6) "on the grounds of public official immunity and/or qualified immunity, as well as the doctrine of sovereign immunity." The trial court denied Defendants' motions under Rules 12(b)(1), (2), and (6) but did specify the grounds upon which the order is based. Defendants immediately appealed to this Court arguing that they are entitled to public official immunity and the trial court erred in denying their motions to dismiss.

II. Discussion

¶ 4 Defendants argue the trial court erred in denying their motions to dismiss pursuant to 12(b)(6) and 12(b)(2). When reviewing a Rule 12(b)(6) motion, this Court applies a *de novo* standard of review. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999) (quoting *Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994)). A Rule 12(b)(6) motion to dismiss "should not be granted 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' " *Id.* 350 N.C. at 604-605, 517 S.E.2d at 124 (emphasis omitted) (quoting *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970)).

¶ 5 A case is dismissed under Rule 12(b)(2) for lack of personal jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (2021). When a party asserts sovereign immunity, "[t]he defense of sovereign immunity is a matter of personal jurisdiction that falls under Rule 12(b)(2) . . . ." *Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P.*, 160 N.C. App. 626, 629, 586 S.E.2d 812, 815 (2003) (citation omitted). A denial of a "Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable . . . ." *Parker v. Town of Erwin*, 243 N.C. App. 84, 95, 776 S.E.2d 710, 720 (2015) (citation omitted). We review a Rule 12(b)(2) motion for evidence within the record that would support the court's determination of personal jurisdiction. *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 257 (2012).

¶ 6 In this case, Defendants contend they are entitled to public official immunity through their employment with NCDOT. To grant public official immunity, we first must determine whether Defendants are public officials or public employees. "When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993) (quoting *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 236 (1990)). Public employees can be held individually liable for mere negligence in the performance of their duties while public officials "cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties . . . ." *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997). In order to determine whether the Defendants are public officials or public employees, we are guided by our Supreme Court in *Isenhour v. Hutto*,

> [o]ur courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties.

350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999). Whomever is asserting public official immunity must show all three factors of the *Isenhour* test exist. *See McCullers v. Lewis*, 265 N.C. App. 216, 222, 828 S.E.2d 524, 532 (2019); *Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017). In addition to this three part test, a public official "is generally required to take an oath of office while an agent or employee is not required to do so." *Leonard*, 254 N.C. App. at 699, 803 S.E.2d at 449 (citation omitted). However, an oath of office "is not absolutely necessary" to be considered a public official. *McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532 (citation and internal quotation marks omitted).

¶ 7 Here, Defendants argue they are public officials because their positions within NCDOT were created pursuant to N.C. Gen. Stat. §§ 143B-345, 143B-346, and 136-18. We disagree. A person occupies a position created by legislation if the position "ha[s] a clear statutory basis or the officer ha[s] been delegated a statutory duty by a person or organization created by statute." *Fraley v. Griffin*, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011) (citation and internal quotation marks omitted). The first cited statute, N.C. Gen. Stat. § 143B-345

is a one sentence statement which operates to establish NCDOT as a department within North Carolina. Similarly, N.C. Gen. Stat. § 143B-346 functions to provide a brief one paragraph overview of the function and purpose of NCDOT. We note that when interpreting a statute "the legislative will is the all-important or controlling factor." *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 368, 250 S.E.2d 271, 273 (1979) (citation omitted). As such, "the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree." *Id.* 296 N.C. at 369, 250 S.E.2d at 273.

¶ 8 A review of Section 143B-345 and Section 143B-346 shows both statutes are void of any created positions and only speak to NCDOT as an entity in and of itself. Thus the texts of N.C. Gen. Stat. § 143B-345 and N.C. Gen. Stat. § 143B-346 illustrate a legislative intent to create and guide NCDOT as an entity, not to legislate employment positions within NCDOT. In other words, Defendants cannot rely on N.C. Gen. Stat. § 143B-345 and N.C. Gen. Stat. § 143B-346 as statutes that clearly establish their positions within NCDOT as these statutes do not establish *any* position within NCDOT.

¶ 9 Turning to the remaining statute cited by Defendants, N.C. Gen. Stat. § 136-18 functions to define and list the powers allotted to NCDOT as a department. The existence within a statute of a "statutory definition does not constitute [the] creating . . . [of a] position." *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696. *See Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 177, 682 S.E.2d 224, 228 (2009) (holding the defendant's cited statutes do "not create the position of teacher[,] it defines the duty of teacher"). Notably, none of the language of N.C. Gen. Stat. § 136-18 establishes a position within NCDOT but refers to NCDOT as an entity in and of itself. Again, the lack of creation of a position within Section 136-18 indicates the legislature did not intend for Section 136-18 to statutorily create an employment position within NCDOT. Overall, none of statutes cited by Defendants operate to create positions within NCDOT.

¶ 10 Though N.C. Gen. Stat. § 136-18, N.C. Gen. Stat. § 143B-345, and N.C. Gen. Stat. § 143B-346 grant statutory responsibility to NCDOT, these statutes do not in turn delegate such statutory authority to employees of NCDOT. Thus, Defendants have not established a clear statutory basis for their positions within NCDOT and are considered public employees, not public officials.

III. Conclusion

¶ 11 In summary, because no statute creates the positions held by Defendants within NCDOT, Defendants are public employees and, as such, are not entitled to public official immunity. Since the trial court had personal jurisdiction over Defendants and Plaintiff sufficiently stated a claim upon which relief can be granted, we affirm the trail court's denial of Defendants' motions pursuant to North Carolina Rules of Civil Procedure Rules 12(b)(2) and (6).

AFFIRMED.

Judges DILLON and ARROWOOD concur.

GREENBRIER PLACE, LLC, Plaintiff
v.
BALDWIN DESIGN CONSULTANTS, P.A., and MICHAEL W. BALDWIN, Defendants

No. COA20-654

Filed 2 November 2021

Appeal and Error—interlocutory order—substantial right—risk of inconsistent verdicts—claims requiring different proof

In a case where a limited liability company (plaintiff) accused a consulting firm and its owner (defendants) of misrepresenting the costs of developing a residential subdivision project, plaintiff's appeal from an interlocutory order granting partial summary judgment in favor of defendants—on plaintiff's claims for unfair and deceptive trade practices, fraud, and constructive fraud—was dismissed because the order did not affect a substantial right. Specifically, plaintiff's remaining claims for negligence, negligent misrepresentation, and breach of contract required different proof than the claims resolved on summary judgment, and therefore plaintiff would not face a risk of inconsistent verdicts on common factual issues in different trials.

Appeal by plaintiff from order entered 16 March 2020 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 22 September 2021.

Law Office of W. Gregory Duke, by W. Gregory Duke, for plaintiff-appellant.

Cranfill Sumner LLP, by Steven A. Bader and Daniel G. Katzenbach, for defendants-appellees.

ARROWOOD, Judge.

¶ 1 Greenbrier Place, LLC ("plaintiff") appeals from the trial court's order granting partial summary judgment in favor of Baldwin Design Consultants, P.A. and Michael W. Baldwin ("defendants"). Plaintiff contends the trial court erred in granting defendants' motion for summary judgment, specifically arguing that the ruling affects a substantial right and creates a possibility of inconsistent verdicts. Defendant has filed a motion to dismiss plaintiff's appeal, arguing the appeal is interlocutory and does not affect a substantial right. For the following reasons, we dismiss plaintiff's appeal.

I. Background

¶ 2 Plaintiff is a North Carolina limited liability company formed for the purposes of developing a residential subdivision known as Greenbrier Place. Plaintiff filed a complaint against defendants on 12 October 2017, asserting claims of negligence, negligent misrepresentation, breach of contract, unfair and deceptive trade practices, fraud, and constructive fraud. In the complaint, plaintiff alleged that on 20 August 2015, defendants produced and provided a "Probable Development Costs Estimate" to Cherry Construction Company, Inc. ("Cherry Construction") acting as plaintiff's agent. The estimate concerned the development of a forty-three lot Greenbrier Place residential neighborhood and included an estimate in the amount of $1,066,259.84. Plaintiff purchased the land for development on 29 December 2015. Plaintiff alleged that on or around February 2016, defendants provided plaintiffs with an updated "Summary of Development Costs" estimating total costs of $818,337.51 for twenty eight of the forty-three proposed lots, reflecting an increase "by a minimum amount of $190,472.80[.]"

¶ 3 Defendant Michael W. Baldwin ("Baldwin") filed an answer and third-party complaint on 18 December 2017. Defendant Baldwin Design Consultants, P.A. ("Baldwin Design Consultants") filed counterclaims on 15 July 2019.

¶ 4 On 26 July 2019, plaintiff filed a response to Baldwin Design Consultants' counterclaims which included affirmative defenses and a motion to dismiss the counterclaims for failure to state a claim upon which relief could be granted.

¶ 5 On 19 November 2019, defendants filed a motion for partial summary judgment as to plaintiff's claims for unfair and deceptive trade practices, fraud, and constructive fraud. On 27 November 2019, plaintiff filed a motion in opposition seeking summary judgment on all six of plaintiff's claims as well as Baldwin Design Consultant's counterclaims.

¶ 6 The matter came on for hearing on 9 December 2019 in Pitt County Superior Court, Judge Foster presiding.

¶ 7 On 16 March 2020, the trial court entered an order granting defendants' motion for partial summary judgment and denying plaintiff's motion for summary judgment and motion in opposition. The order did not provide certification for appeal pursuant to North Carolina Rules of Civil Procedure Rule 54(b).

¶ 8 Plaintiff filed written notice of appeal on 14 April 2020.

II. Discussion

¶ 9 Plaintiff contends the trial court erred in granting defendants' partial motion for summary judgment. Before addressing plaintiff's arguments, we must address defendants' motion to dismiss plaintiff's appeal as interlocutory.

¶ 10 " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Review of an interlocutory ruling is proper if the trial court certifies the case for appeal pursuant to North Carolina Rules of Civil Procedure Rule 54(b), or if the ruling deprives the appellant of a substantial right that will be lost absent immediate review. N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3) (2019). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

¶ 11 Our Supreme Court has determined that a "substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)).

¶ 12 The inconsistent verdicts doctrine is a subset of the substantial rights doctrine and is "often misunderstood." *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 646, 847 S.E.2d 229, 233 (2020), *disc. review denied*, 377 N.C. 566, 858 S.E.2d 284 (2021). An appellant is required to show "that the same factual issues are present in both trials *and* that [appellants] will be prejudiced by the possibility that inconsistent verdicts may result." *Hien Nguyen v. Taylor*, 200 N.C. App. 387, 391, 684 S.E.2d 470, 473-74 (2009) (citing *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994)). Avoiding separate trials on different issues does not affect a substantial right. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 7, 362 S.E.2d 812, 816 (1987). Additionally, "[t]he mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 80, 711 S.E.2d 185, 190 (2011).

¶ 13 "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (citation omitted). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.* (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

¶ 14 Plaintiff cites *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 684 S.E.2d 41 (2009) to support application of the inconsistent verdict doctrine. In *Carcano*, this Court found that the plaintiffs demonstrated the risk of an inconsistent verdict because two facts—whether "defendants caused plaintiffs' damages by falsely representing that 'JBSS, LLC,' validly existed as an LLC and by inducing plaintiffs to invest in the business"—would likely be determinative of all claims and that two juries could reach different outcomes on these overlapping factual issues. *Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47.

¶ 15 In the case *sub judice*, plaintiff argues that the trial court's order affects a substantial right because there are factual issues common to all claims, including whether defendants caused plaintiff's damages "by falsely representing that all of the costs of developing the residential subdivision project were included in the PDC Estimates[.]" Plaintiff also raises factual issues related to a vegetative buffer required by city code, whether defendants should have included disclaimers or exclusions of

costs not reflected in the PDC estimates, and whether defendants should have obtained updated subcontractor bids for the estimates rather than relying on data from prior projects.

¶ 16 Defendants argue that plaintiff's remaining claims for negligence, negligent misrepresentation, and breach of contract require different proof than the unfair and deceptive trade practices and fraud claims disposed of by the trial court. This Court has held that negligence claims require different proof than claims for unfair and deceptive trade practices or fraud. *See Ausley v. Bishop*, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) (claim of fraud differs from claim of negligence); *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 172, 681 S.E.2d 448, 455 (2009) (unfair and deceptive trade practices violation requires more than negligence). This Court has also recognized "that actions for unfair or deceptive trade practices are distinct from actions for breach of contract and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. [Gen. Stat.] § 75-1.1." *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citations omitted). Additionally, failure to perform under the terms of a contract, standing alone, does not support a claim of fraud. *Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E.2d 760, 762 (1961) ("It is the general rule that an unfulfilled promise cannot be made the basis for an action for fraud.").

¶ 17 Although plaintiff presents several facts from which the claims arise, plaintiff has failed to carry the burden of showing that the inconsistent verdict doctrine applies. Plaintiff's remaining claims require different proof than the claims resolved on summary judgment, and accordingly plaintiff has failed to identify common facts that are determinative of all claims. Because plaintiff has failed to show that a substantial right has been affected, we grant defendants' motion to dismiss plaintiff's appeal.

III. Conclusion

¶ 18 For the foregoing reasons, we dismiss plaintiff's appeal.

DISMISSED.

Judges CARPENTER and GRIFFIN concur.

IN RE A.S.

[280 N.C. App. 149, 2021-NCCOA-585]

IN THE MATTER OF A.S.

No. COA21-149

Filed 2 November 2021

1. Constitutional Law—right to impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses

In an involuntary commitment hearing in which no counsel was present for the State, the trial court did not violate respondent's procedural due process right to an impartial tribunal by questioning witnesses because there is no constitutional right to opposing counsel, there was no statutory requirement for the State to have an attorney present where respondent was being treated at a private facility, and the trial court did not advocate for either side during its questioning.

2. Mental Illness—involuntary commitment—commitment examiner's report—not entered into evidence—not incorporated as findings

In an involuntary commitment proceeding, where the trial court did not enter into evidence a report by the examining doctor (who was not present at the hearing) and did not check box number four on the form written order (which would have indicated that the court found as facts, by clear, cogent, and convincing evidence, all matters set out in the commitment examiner's report and incorporated the report by reference as findings), the trial court did not incorporate the report as findings in its order, despite hand-writing the name of the doctor and date of her report on the written order.

3. Mental Illness—involuntary commitment—danger to others—sufficiency of findings

The trial court's involuntary commitment order contained sufficient findings, though brief, to support its determination that respondent was a danger to others, based on evidence of past behavior (that respondent had been previously hospitalized, had been medication non-compliant, and had burned his furniture) and evidence indicating the probability of future harm absent treatment (that respondent was verbally abusive to facility staff and had to be sequestered from others at the facility and his own testimony that he would not take medicine by injection due to his paranoia about needles).

IN RE A.S.

[280 N.C. App. 149, 2021-NCCOA-585]

Appeal by respondent from involuntary commitment order entered 20 November 2020 by Judge Pat Evans in Durham County District Court. Heard in the Court of Appeals 6 October 2021.

Yoder Law PLLC, by Jason Christopher Yoder, for respondent-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Rachel A. Brunswig, for the State.

ARROWOOD, Judge.

¶ 1 A.S. ("respondent") appeals from an involuntary commitment order committing him to an inpatient 24-hour facility for a period of thirty days. For the following reasons, we affirm.

I. Background

¶ 2 On 6 November 2020, Barbara Persinger, respondent's mother, filed an Affidavit and Petition for Involuntary Commitment in Granville County District Court, which read:

> RESPONDENT IS AGGRESSIVE AND VERBA[L]LY ABUSIVE WITH HIS MOTHER AND ACT[T] TE[AM] MEMBERS. HE HAD A HAMMER IN HIS PANTS, HOWEVER HE DID NOT MAKE ANY MOVEMENTS TO USE IT AS A WEAPON. HE IS TALKING IN MULTIPLE VOICES. HE HAS PRESCRIBED MEDICATION, BUT HIS MOTHER DOES NOT THINK HE IS TAKING IT ON A REGULAR BASIS. MOTHER HAS PETITIONED THE GRANVILLE COUNTY SYSTEM FOR GUARDIANSHIP OF [RESPONDENT] SINCE HIS LAST PETITION.

Respondent was taken into custody on 6 November 2020 and delivered to Duke Regional Hospital ("Duke") in Durham County the next day. After a first-level examination and evaluation were conducted on respondent on 7 November 2020, Doctor Grace C. Thrall ("Dr. Thrall") conducted a second examination on 8 November 2020. After the examination, Dr. Thrall described the following:

> [Respondent] is a 45 y.o. single white male with Brugada syndrome, schizoaffective disorder and past alcohol abuse, complicated by poor insight and medication nonadherence, requiring multiple psychiatric

> hospitalizations and followed by Carolina Outreach ACTT team. He presents to the D[uke] ED on petition by his mother for worsening psychosis characterized by disorganized thinking, growling speech, paranoia (walking around with a hammer in his pants x 2 days), increased verbal agitation with family and ACTT, and delusions about robots and artificial intelligence. His ACTT team believes he has not been compliant with his antipsychotic medications and is concerned he is not safe in the community, having assaulted his mother in the past when mistaking her for a robot and having taken an ax to most of his furniture and electronics and burned them on his grill.

Dr. Thrall concluded respondent was a danger to himself and others, and recommended thirty days of inpatient commitment.

¶ 3 An involuntary commitment hearing was held before the Durham County District Court, Judge Evans presiding, on 20 November 2020 to determine the appropriateness of respondent's involuntary commitment. Respondent, respondent's counsel, and Doctor Leslie Bronner ("Dr. Bronner"), a Duke employee who had been treating respondent, were present at the hearing, while neither the State nor Duke had any counsel present. At the outset, respondent's counsel objected to "proceeding without representation" for the State. The trial court overruled the objection and allowed the hearing to move forward. The trial court examined Dr. Bronner. Dr. Bronner testified, in pertinent part, to the following:

> [T]his is a 45-year-old patient with a history of schizoaffective disorder. He has more than 20 psychiatric hospitalizations. He came to Duke . . . due to medication non-compliance. He dismissed his outpatient treatment team. He was verbally abusive towards his mother. He was burning furniture, and so he was brought in for psychiatric evaluation. I saw him on the second day that he had been admitted to the psychiatric ward. I've been working with him daily since then, except for weekends.
>
> Initially he was very irritable and dismissive. He would barely talk to me. If he talked, he would not allow me to speak. He mainly talked about how he was not -- he was sort of blaming people for not allowing him to live on his own. He said that he has been

> medication compliant. He was dismissive of all of the things that his outpatient treatment team said, as well as his mother. He was medication compliant with his Invega. Initially, however, because of his behaviors, he's had to be sequestered from the rest of the unit. He becomes agitated, he becomes verbally abusive to staff. He starts yelling, he starts pacing. He is refusing medications to help him calm down, and so we still have not been able to allow him to interact with the rest of the ward.
>
> . . . .
>
> And so, because he's not compliant with his oral medications, . . . he needs to be on a long-acting injectable medication. I talked to him about that yesterday. He said that he was not going to do it. He did not need to do it, and that he was going to take me to court to shut me up . . . . And so, he continues to need to be hospitalized because he remains a danger to himself and others.

¶ 4 Throughout this portion of Dr. Bronner's testimony, respondent interrupted multiple times by, among other things, objecting, arguing against Dr. Bronner's testimony, asking whether he would have the opportunity to represent himself, and making references to "stalkers . . . from Raleigh . . . that won't leave me alone."

¶ 5 Once Dr. Bronner was allowed to continue with her testimony, she stated:

> Because it's been very difficult to manage his behaviors on the unit, he remains sequestered from other patients on the unit. He still needs to be hospitalized for further medication management and he also needs to be on a long-acting injectable to prevent further psychiatric hospitalizations due to medication non-compliance.

When asked whether she believed respondent was a danger to others, Dr. Bronner replied that she did, and explained, in pertinent part: "He's been agitated and verbally abusive to the staff and to me, and we're unable to even allow him to interact with other people on the unit." Dr. Bronner asked that he be committed for thirty days.

¶ 6 On cross-examination, Dr. Bronner testified that respondent had not made threats or attempts to harm himself and "ha[d] not physically touched anybody" while at Duke, though "he postures and paces." Regarding respondent's willingness to take his prescribed medication, Dr. Bronner testified: "He's partially compliant. He takes scheduled medication, but when he gets agitated and aggressive towards staff, we want to try to give him other medications to calm him down which he has refused and it just lets me know that he needs more scheduled medication." At this point, respondent interrupted again.[1]

¶ 7 Next, respondent testified as witness. After mentioning his allergy to Lithium, respondent's testimony, in pertinent part, proceeded as follows:

> Q. So, is the reason that you do not want to take some of the as-needed medication, or the long-acting injectable, because you're afraid of allergic reactions?
>
> A. I am scared -- I'm paranoid of the needles. As part of my condition that it's under my belief that there is a robot cybernetic unit, possibly from the International Robo Expo that has manipulated time and uses their plastic injectable disc to write them and lock us in certain discause [sic], where we're punished . . . and our bodies are transported in and out for their amusement and for our punishment, and the needles scare me so bad, I am paranoid schizophrenic and it is because of exactly that injectables [sic].
>
> . . . .
>
> So I don't mind taking the oral alternative. I've been compliant with the oral alternative for over 14 years now.

¶ 8 When asked whether he had ever thought about harming himself in the last month, respondent replied: "Absolutely not. I love myself. I don't want to be harmed at all. I love myself, my family. I don't want anybody else to be harmed." When asked whether, while at Duke, he had "thought about harming anyone on the unit[,]" respondent replied: "I have not. I've actually taken note that there -- that black people from harming me [sic]. I even closed off the back corridors of the unit so that

1. Here, respondent appears to talk about his medication and claims he had been "completely compliant in all cases," though much of his statement is unclear with portions marked in the transcript as indiscernible.

they can't get in to harm me." When asked by his counsel if there was anything else he wanted to share, respondent made a long, incoherent statement in which he made references to his paranoia of "the digital age[,]" "transposing time[,]" the mandate of "an unescapable hell[,]" and an "alien cross-communication virus . . . ."

¶ 9 Respondent's counsel asked the trial court to find respondent was not a danger to himself or others, citing respondent's testimony that he did not think about harming himself or others, that he had not made threats or attempts to harm himself, and that he had not touched others. Respondent interrupted throughout. The trial court concluded: "I do find that [respondent] has a mental illness, he's a danger to himself and to others. He's to be recommitted to the 24-hour in-patient facility for a period not to exceed 30 days."

¶ 10 The trial court filed a written Order on the same day. In this Order, the trial court did not check box number four—"by clear, cogent, and convincing evidence, [the trial court] finds as facts all matters set out in the commitment examiner's report specified below, and the report is incorporated by reference as findings." However, in the designated space below box number four, the trial court provided Dr. Thrall's name—"Dr. Grace Thrall"—and the date of her last report on respondent—"11-18-20[.]" Conversely, the trial court checked box number five, indicating that it found "by clear, cogent, and convincing evidence" "facts supporting involuntary commitment[.]" This was followed by the trial court's handwritten notes:

> Prior to court, [r]espondent insisted Judge recuse herself because unqualified to hear federal matters. He constantly interrupted proceedings; stating he was being stalked. Non-compliant when admitted to hospital and remains medication non-compliant. Has to be sequestered from others on unit because verbally abusive towards staff. Postures and paces. Told Doctor he would take her to court to "shut her up." Dismissed outpatient treatment team. During direct examination, [respondent] babbled about intergalaxial [sic] conspiracies.

Based on these findings, the trial court concluded respondent "has a mental illness" and "is dangerous" to himself and others, and ordered that respondent be committed to Duke for no longer than thirty days.

¶ 11 Defendant filed written notice of appeal on 24 November 2020. Because "[a]n appeal of right lies with this Court from a final judgment of

involuntary commitment[,]" this appeal is properly before us. *In re J.C.D.*, 265 N.C. App. 441, 444, 828 S.E.2d 186, 189 (2019) (citations omitted).

II. Discussion

¶ 12 Respondent contends on appeal that: (A) the trial court violated respondent's due process right to an impartial tribunal because of the absence of a representative for the State during the hearing, and because the trial court asked questions during witness testimony; and (B) the trial court erred in adopting Dr. Thrall's report.

A. Impartial Tribunal

¶ 13 **[1]** "The due process right to an impartial tribunal raises questions of constitutional law that we review de novo." *In re Q.J.*, 2021-NCCOA-346, ¶ 19 (citing *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 66, 468 S.E.2d 557, 562 (1996)). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." *Id.* (quotation marks omitted) (quoting N.C. R. App. P. Rule 10(a)(1) (2021)). Here, respondent's counsel objected to proceeding without opposing counsel at the outset of the hearing. Thus, the issue has been properly preserved for our review. *See id.*

¶ 14 Respondent argues the trial court violated his right to procedural due process and an impartial tribunal because the involuntary commitment hearing proceeded in the absence of opposing counsel and because the trial court "examined witnesses, became a witness itself for events that occurred before the hearing started, and even entered evidence without informing the respondent or allowing the respondent to object." We disagree.

¶ 15 As this Court has noted, there is no constitutional right to opposing counsel. *Id.* ¶ 21 (quoting *In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983)). Additionally, per our statutes:

> [T]he Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

N.C. Gen. Stat. § 122C-268(b) (2019). Thus, here, because respondent was being treated at Duke, a private institution, there is no statutory

requirement to have an attorney for the State present at respondent's hearing. *See id.*

¶ 16 Further, for a judge to "preside at an involuntary commitment hearing and also question witnesses at the same proceeding" does not jeopardize a respondent's constitutional rights. *In re Q.J.*, ¶ 21 (quotation marks omitted) (quoting *In re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983)). In fact, in such instances, "[j]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice." *Id.* ¶ 22 (alteration in original). Thus, "[i]t is entirely proper, and sometimes necessary, that they ask questions of a witness[.]" *Id.* (citation omitted; second alteration in original). However, at the same time, trial courts cannot conduct themselves in such ways "that could be construed as advocacy for or against either" party. *Id.* ¶ 23.

¶ 17 Here, the trial court's only substantive questions of Dr. Bronner on direct examination were the following:

> Q. All right, ma'am, whenever you're ready . . . . Whatever it is you want me to know about why we're here today.
>
> . . . .
>
> Q. All right ma'am. If you could start over slowly for me so I can take notes.
>
> . . . .
>
> Q. He was going to take you to court to what? . . . . Shut you up? Okay.
>
> . . . .
>
> Q. Anything else?
>
> . . . .
>
> Q. All right. You testified that you believe he's a danger to himself. Do you believe he's a danger to others?
>
> . . . .
>
> Q. And what do you base that on?
>
> . . . .
>
> Q. All right. And how long are you asking for?

Similarly, during respondent's testimony, the trial court only stated, "Thank you so much for sharing with me[,]" and, "Thank you for sharing with me, [respondent]."

¶ 18 Here, there is nothing from the transcript that indicates the trial court, while asking questions of witnesses, was advocating or intending to advocate for either party. *See id.* (finding no issue with the trial court when it asked on direct examination: "All right, ma'am. Tell me what it is you want me to know about this matter"; "Anything else?"; and "I'm sorry. What was the last thing you said?"). Accordingly, the trial court did not violate respondent's due process right to an impartial tribunal by allowing the hearing to proceed without opposing counsel and by asking questions itself. *See id.*

B. Adoption of Dr. Thrall's Report and Findings of Fact

¶ 19 Respondent argues the trial court erred in adopting Dr. Thrall's report because it "did not find the report by clear, cogent, and convincing evidence," "the report was entered by the trial court without notice to [respondent] in violation of his right to confront and cross-examine Dr. Thrall[,]" and the report contained inadmissible hearsay.

1. Dr. Thrall's Report

¶ 20 **[2]** As a preliminary matter, we address the fact that the written Order does not check box number four while simultaneously providing pertinent information below it. Respondent argues that, because the trial court did not move to enter Dr. Thrall's report into evidence during the hearing, or otherwise make any other mention of it prior to the issuance of its Order, it was error for the trial court to refer to it in its written Order. Particularly, respondent argues the trial court "considered the report in making its final determination" without "indicat[ing]" in the written Order "that it was finding all of the facts contained in the examiner's report by clear, cogent, and convincing evidence"—in other words, without checking box number four. Conversely, the State argues that, precisely because the trial court did not check box number four, the trial court did not incorporate Dr. Thrall's report as findings at all.

¶ 21 "Certified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f). Throughout respondent's hearing, the trial court did not move to admit Dr. Thrall's report into evidence, and neither Dr. Thrall nor her report were ever mentioned in open court. Additionally, at the conclusion of the hearing, the trial

court did not announce that it intended to incorporate Dr. Thrall's report, or any report, when it ordered that respondent be recommitted. *Cf. In re J.C.D.*, 265 N.C. App. at 443, 828 S.E.2d at 189 ("The trial court announced at the conclusion of the hearing . . . it would incorporate by reference as findings in the order the report of Dr. Ijaz and offered by Ms. Motley."). Furthermore, because neither Dr. Thrall nor any other witness were present during the hearing to authenticate the report, any attempt to admit the report into evidence or otherwise incorporate it as findings would have been error. *See* N.C. Gen. Stat. § 122C-268(f).

¶ 22 Thus, here, the Record and the transcript do not reflect that the trial court admitted into evidence Dr. Thrall's report during the hearing—nor do they reflect that the trial court inadvertently failed to check box number four in its written Order. *Cf. State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (concluding, where there were inconsistencies between the hearing transcript and the sentencing form, that the transcript clearly indicated "that the trial court simply misread the sentencing form and checked the wrong box[,]" and thus concluding the trial court had committed a clerical error).

¶ 23 This Court has found that a "trial court's checking of a box" by itself "is insufficient to support th[e] determination" that a respondent is a danger to himself or others. *In re J.C.D.*, 265 N.C. App. at 448, 828 S.E.2d at 192 (quotation marks omitted) (quoting *In re Allison*, 216 N.C. App. 297, 300, 715 S.E.2d 912, 915 (2011)); *see also id.* at 447, 828 S.E.2d at 191 ("Merely placing an 'X' in the boxes of the form order has been disapproved repeatedly[.]" (citation and some quotation marks omitted)). By the same logic, we conclude that a written order that, by virtue of not checking the designated box, does not expressly indicate the trial court "by clear, cogent, and convincing evidence[] finds as facts all matters set out" within a report cannot be construed to mean the inverse. *Cf. id.* at 447-48, 828 S.E.2d at 191-92.

¶ 24 Thus, here, because it did not enter Dr. Thrall's report into evidence and did not check box number four in its written Order, the trial court did not incorporate the report as findings in its Order.[2] *See* N.C. Gen.

2. In this instance, we distinguish this case from our decision in *In re Q.J.*, 2021-NCCOA-346. There, in dicta, the majority opinion described the report at issue as being incorporated as findings, "although the trial court listed the examination [the doctor] completed" without "check[ing] the box expressly incorporating the report as findings of fact." *Id.* ¶ 13. There, the State and the respondent agreed that the doctor's report had been incorporated by reference, and thus the respondent's issues on appeal did not address the propriety of the trial court's written order. *See id.* ¶¶ 14, 30 n. 4. Thus, the majority in *In re Q.J.* did not reach the issue of whether a written order in which box number four is

Stat. § 122C-268(f). Because we determine that the report was not incorporated, the remainder of respondent's arguments regarding the propriety of the trial court's mention of the report on the written Order are no longer properly relevant to our review.

2. Findings of Fact

¶ 25 **[3]** Respondent also argues that, without Dr. Thrall's report, the trial court's remaining findings of fact fail to support the finding that he was dangerous to himself or others. We disagree.

¶ 26 Even if the trial court had actually improperly incorporated Dr. Thrall's report, the hearing testimony and the trial court's findings of fact as listed on the remainder of its written Order, which are not based upon Dr. Thrall's report in any respect, are sufficient to support the involuntary commitment Order.

¶ 27 "It is the role of the trial court to determine whether the evidence of a respondent's mental illness and danger to self or others rises to the level of clear, cogent, and convincing." *In re Q.J.*, ¶ 26 (citation omitted). On appeal, "[t]his Court reviews an involuntary commitment order to determine whether the ultimate findings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence." *Id.* (citation and quotation marks omitted; alteration in original).

¶ 28 Per our statutes,

> [t]o support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others . . . . The court shall record the facts that support its findings.

N.C. Gen. Stat. § 122C-268(j). Additionally,

> the trial court must satisfy two prongs when finding a respondent is a danger to self or others . . . : "A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's history

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unchecked, but information pertinent to it is provided thereunder, constitutes incorporation. *See id.* ¶ 14. Here, because respondent argues that it was error for the trial court to "consider" Dr. Thrall's report, by writing her name and the date of the report on the written Order, without expressly incorporating the report and without admitting it into evidence, and because the State specifically contends it was not incorporated, we address the issue outright.

> of mental illness or . . . behavior prior to and leading up to the commitment hearing, but must [also] include findings of 'a reasonable probability' of some future harm absent treatment[.]"

In re Q.J., ¶ 25 (citation omitted; last three alterations in original). "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." *Id.* (citation and some quotations marks omitted).

¶ 29 Here, "[b]ecause we conclude the trial court properly found [r]espondent was a danger to [others], we do not reach the issue of whether he was a danger to [himself]." *See In re C.G.*, 2021-NCCOA-344, ¶ 33.

¶ 30 Our statutes define "danger to others" as follows:

> Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11)(b).

¶ 31 In its written Order, the trial court checked box number five, by which it found "by clear, cogent, and convincing evidence" "facts supporting involuntary commitment." The trial court then listed those facts:

> Prior to court, [r]espondent insisted Judge recuse herself because unqualified to hear federal matters. He constantly interrupted proceedings; stating he was being stalked. Non-compliant when admitted to hospital and remains medication non-compliant. Has to be sequestered from others on unit because verbally abusive towards staff. Postures and paces. Told Doctor he would take her to court to "shut her up." Dismissed outpatient treatment team. During direct

> examination, [respondent] babbled about intergal-axial [sic] conspiracies.

¶ 32 These fact findings are drawn directly from the evidence at respondent's hearing. The trial court heard from Dr. Bronner that respondent had been previously hospitalized, had been medication non-compliant, had burned his furniture, had told Dr. Bronner he would take her to court to "shut her up[,]" was verbally abusive, and had had to be kept separated from other people on his unit due to his behavior and medication non-compliance. Dr. Bronner also stated that, because respondent remained medication non-compliant, he would have to remain sequestered from others.

¶ 33 The trial court also observed in open court respondent interrupting Dr. Bronner's testimony repeatedly, stating, during his own testimony, he would not take needed medical injections because he was paranoid about needles and robots "punishing" him through needles, stating he had blocked the corridors of his unit to stop people from harming him, and making many other incoherent statements.

¶ 34 Thus, here, the trial court satisfied the two prongs to support an involuntary commitment order because it made findings of respondent's past behavior and findings indicative to his probability of future harm absent treatment. *See In re Q.J.*, ¶ 25. Accordingly, these findings of fact, while cryptic and bare boned, are sufficient to support the issuance of the Order and are supported by the testimony of respondent's treating physician and the actions of respondent at the hearing. Thus, the trial court did not err in finding respondent was a danger to others.

III. Conclusion

¶ 35 Accordingly, we affirm the trial court's Order.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

IN RE A.W.

[280 N.C. App. 162, 2021-NCCOA-586]

IN THE MATTER OF A.W.

No. COA21-182

Filed 2 November 2021

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparents—fitness of parents—constitutionally protected parental status—insufficient findings

In a neglect and dependency case, a permanency planning order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the trial court made insufficient findings of fact supporting its conclusion that respondents were unfit or had acted inconsistently with their constitutionally protected status as parents. The court's findings focused on respondents' history of domestic violence, but there was no clear, cogent, and convincing evidence that respondents were presently unfit, especially where they had fully participated in services to address domestic violence, there had been no new incidents of domestic violence in the home since the juvenile petition's filing, and the child had a positive bond with respondents. Further, where a juvenile neglect petition regarding respondents' younger child was dismissed before the court entered the permanency planning order, the order failed to address why respondents were unfit to parent one child but not the other.

2. Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—insufficient findings

In a neglect and dependency case, the trial court's order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the court failed to make adequate findings to support ceasing reunification efforts. The court made no finding that respondents had failed to make adequate progress in their family case plans, and all evidence showed the contrary, especially where respondents had fully participated in services to address past domestic violence, they had bonded well with the child during visits, and the department of social services (DSS) had dismissed a juvenile neglect petition as to respondents' infant son after monitoring him and allowing him to remain in respondents' care since birth. Further, the court made no finding that respondents refused to cooperate with DSS or the guardian ad litem (GAL) program, and its finding that respondents had not made themselves readily available to DSS or the GAL was not supported by the evidence.

IN RE A.W.

[280 N.C. App. 162, 2021-NCCOA-586]

Appeal by respondents from orders entered 30 October 2020 and 10 November 2020 by Judge Jason H. Coats in Johnston County District Court. Heard in the Court of Appeals 5 October 2021.

Holland & O'Connor, PLLC, by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services.

Kimberly Connor Benton for respondent-appellant mother.

Benjamin J. Kull for respondent-appellant father.

Mobley Law Office, P.A., by Marie H. Mobley, for guardian ad litem.

TYSON, Judge.

¶ 1 Respondent-mother and Respondent-father, collectively "Respondents," appeal the trial court's order awarding permanent guardianship of their daughter to her foster parents. We vacate and remand.

I. Factual and Procedural Background

¶ 2 Johnston County Department of Social Services ("JCDSS") became involved with A.W. ("Andrea"), and her family after law enforcement responded to a 911 call to their home following an incident of domestic violence between Respondents in March 2018. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the juvenile). JCDSS alleged Respondent-father had assaulted Respondent-mother by attempting to stab her with a steak knife in February 2018 while ten-month-old Andrea and her stepsiblings were present. JCDSS implemented a safety assessment plan at this time. Respondent-father was arrested and charged. This charge was later dismissed.

¶ 3 On 24 April 2018, JCDSS removed Andrea and her stepsiblings from the home due to alleged violations of the safety plan by Respondent-father. One month later, JCDSS removed Andrea and her stepsiblings from the temporary safety provider's home. Respondent-father had refused to leave, which triggered a police escort of him from the property. Andrea and her stepsiblings were placed with the stepsiblings' father in South Carolina on 27 May 2018.

¶ 4 JCDSS filed its juvenile petition alleging neglect and dependency on 29 May 2018 after Respondents had removed Andrea from the placement in South Carolina and secreted Andrea's whereabouts for two days.

Respondents returned Andrea to JCDSS' care the same day. Andrea was placed into a nonfamily-member-licensed foster care where she has remained for the pendency of this case.

¶ 5 The adjudication hearing was held on 27 June 2018. The court issued its order adjudicating Andrea as neglected and dependent on 6 December 2018. The order contains 20 findings of fact and indicates, "parents by and through counsel, consent to an Adjudication of neglect and dependency based upon the foregoing findings of fact."

¶ 6 The trial court's disposition order was entered 6 February 2019 and continued Andrea in JCDSS' legal custody. The court ordered Respondents to cooperate with JCDSS and for JCDSS to continue to work towards reunification. In its permanency planning order filed 6 March 2019, the court ordered the primary permanent plan to be reunification with the parents, with a secondary plan of custody or guardianship with an approved caregiver.

¶ 7 In January 2019, the parents engaged in an argument during which Respondent-father allegedly struck Respondent-mother repeatedly. Law enforcement officers responded. Respondent-mother sought a Domestic Violence Protective Order ("DVPO"), alerted JCDSS, provided photos of her injuries, and copies of text messages and other social media posts sent by Respondent-father. Respondent-mother subsequently voluntarily dismissed the DVPO and reunited with Respondent-father. Since January 2019, no other incidents of domestic violence between Respondent-mother and Respondent-father have been reported.

¶ 8 Prior to the permanency planning hearing that is the subject of this appeal, and at the outset to the hearing, Respondent-father moved for the trial judge to recuse himself based upon the trial judge's relationship with Andrea's foster father and proposed guardian. The proposed guardian is a Johnston County Sheriff's deputy and serves as a bailiff in the county courthouse. Respondent-father also moved the court to delay the disposition hearing on Andrea until after an adjudication hearing was held on her younger brother, G.W., who was born after the present case began. The trial court denied both oral motions.

¶ 9 The court determined JCDSS would be relieved of reunification efforts, the permanent plan of guardianship had been achieved and ordered further reviews be suspended. On 30 October 2020, the court issued a permanency planning order awarding guardianship to Andrea's foster parents. Respondents appeal.

II. Jurisdiction

¶ 10 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a) (2019).

III. Analysis

¶ 11 On appeal, both parents filed separate briefs and arguments. Both argue the trial court failed to make the required findings to support ceasing reunification and that they were either unfit or had acted inconsistently with their constitutionally protected status as parents before granting guardianship to nonfamily members or nonparents and waiving further court review. We agree.

A. Constitutionally Protected Status

1. Standard of Review

¶ 12 "Our review of whether conduct constitutes conduct inconsistent with the parents' constitutionally protected status is *de novo*. Under this review, we consider the matter anew and freely substitute our judgment for that of the lower tribunal." *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018) (alterations, citations and internal quotation marks omitted).

¶ 13 This Court has mandated that the trial court "must clearly address whether the parent is unfit or if their conduct has been inconsistent with their constitutionally protected status as a parent" prior to considering granting custody or a guardianship to a nonparent. *In re N.Z.B.*, 278 N.C. App. 445, 450, 863 S.E.2d 232, 236, 2021-NCCOA-345, ¶ 19.

2. Parental Fitness

¶ 14 **[1]** Respondents argue the trial court's finding that they were not fit and proper parents was not supported by clear, cogent, and convincing evidence and violated their constitutional rights to parent.

¶ 15 Our Supreme Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted). The Supreme Court of North Carolina has also recognized the parents' "constitutionally-protected paramount right to custody, care, and control of their child." *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994).

¶ 16 The Supreme Court of North Carolina has held, "a natural parent may lose his constitutionally protected right to the control of his

children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). "[T]he decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted).

¶ 17 No "bright line" exists beyond which the parents' conduct amounts to unfitness or actions inconsistent with the parents' constitutionally protected paramount status. *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010). "Determining whether a parent has forfeited their constitutionally protected status is a fact specific inquiry. In making such a determination, the trial court must consider both the legal parent's conduct and his or her intentions *vis-à-vis* the child." *In re N.Z.B.*, 278 N.C. App. at 450, 863 S.E.2d at 236-37, ¶ 20 (citations and internal quotation marks omitted).

¶ 18 Here, the court's finding of fact 3f provides:

> f. The Court finds by clear, cogent, and convincing evidence that neither parent is a fit and proper parent. The Court finds that the parents are acting inconsistent with the child's health and welfare. Furthermore, the parents have not made themselves readily available to JCDSS or the GAL program.

¶ 19 JCDSS and the guardian *ad litem* ("GAL") argue the above conclusory finding is supported by the trial court's findings of fact 3 a-e set forth in section B below. JCDSS and the GAL conflate the parties' arguments. The trial court's conclusion to cease reunification efforts does not satisfy the requirement that before a court may award permanent custody of a child to foster parents and waive further review, the court must determine whether the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents. *David N.*, 359 N.C. at 307, 608 S.E.2d at 753.

¶ 20 In *D.A.*, the trial court as here, "awarded *de facto* permanent custody of D.A. to the foster parents and waived further review." *In re D.A.*, 258 N.C. App. at 250, 811 S.E.2d at 732. The trial court found:

> neither respondent parent has taken responsibility or provided a plausible explanation for the injuries

> that occurred to the juvenile while he was in their care. That while respondent father's charges were dismissed, and despite pleading guilty to the charges imposed upon her for harming her child, respondent mother continues to maintain that she did not inflict the juvenile's injuries, and this remains a barrier to reunification as the home remains an injurious environment.

Id. at 251, 811 S.E.2d at 732.

¶ 21 This Court held "the trial court's findings [were] insufficient to support a conclusion that Respondent-father was unfit or had acted inconsistently with his constitutionally protected status as a parent." *Id.*

¶ 22 Here, the trial court's order has very few findings of fact, mostly addressing the parties' history of domestic violence. Although the trial court found "there has not been any reports of domestic violence since the last hearing," and that the parties "have completed and/or are participating in services," the trial court also focused on the general characteristics of domestic violence and the fact that "both parents come from prior domestic violence relationships." The trial court states, "neither parent is fit or proper," but this assertion, whether a finding or a conclusion, is not based upon clear and convincing evidence of how either parent was presently "unfit" to exercise their constitutional right to parent Andrea. Further, the court's order contains no mention of how either parent acted inconsistently with their constitutionally protected status as parents. The court's findings must reflect how the parents were unfit or acted inconsistently "*vis-à-vis* the child." *In re N.Z.B.*, 278 N.C. at 450, 863 S.E.2d at 237, ¶ 20.

¶ 23 JCDSS presented the testimony of four social workers who had been involved with the family during the pendency of the case. Juliet Hylton testified she had difficulty engaging the parents' therapists to determine how they were progressing in therapy and to determine their investment in the same. She speculated the parties had not fully acknowledged what had happened and could not move forward.

¶ 24 Deborah Ellis testified she had reviewed the notes from Respondent father's therapy sessions and believed he continued to fail to accept responsibility for Andrea's removal, even after completing the required services on the case plan.

¶ 25 Susan Ahaus expressed concerns that the parents lacked true insight into what has occurred in their relationship and that they were

just "checking the box." Ahaus pointed to Respondent-father "externalizing blame" and Respondent-mother stating the domestic violence was "all her fault." Ahaus acknowledged this was a "hard case" because the Respondents had been participating in their required services, and both parents were receiving therapy and couples' counseling.

¶ 26 Heidi Clay, who was the social worker for G.W.'s case, testified Respondents' home was outfitted with security cameras and she had concerns of power and control by Respondent-father with regards to the cameras. No testimony showed any misuse of the security cameras whatsoever.

¶ 27 The record reflects absolutely no evidence that Respondents placed Andrea in harm's way after their argument that had prompted JCDSS' juvenile petition alleging neglect and dependency. No testimony showed her needs were ignored due to the parents' behaviors. No testimony showed their ongoing neglect or dependency of Andrea. Testimony showed their visitation with Andrea was positive and appropriate, and that she knew and had established bonds to her parents. The four social workers were not qualified as experts on domestic violence. Their lay beliefs that Respondents did not understand the seriousness of domestic violence is not clear, cogent, or convincing evidence that the Respondents are unfit or had continued to engage in conduct inconsistent to parent Andrea, particularly considering the parents' full participation in services, the lack of any additional incidents, and the presence of another child in the home.

¶ 28 We also note that although there was a petition pending regarding the younger child at the time of the hearing, JCDSS dismissed that petition prior to the entry of the order. Thus, when the trial court entered the order, there was no petition concerning the younger child, who had lived with the parents since birth. The trial court's findings that "JCDSS is involved with that minor child and a juvenile petition is pending" is thus not supported by the record. The order does not explain how the Respondents can be fit and proper parents for the younger child but not for Andrea. No evidence tends to show either child had unique needs or circumstances which would render the Respondents unfit to have custody of one child but fit to have custody of the other child. The only basis for the trial court's determination was the existence of a prior history of domestic violence in the home, and prior domestic violence would have the same effect on any child in the home.

¶ 29 The trial court's insistence for Respondents to admit blame to prevent ceasing reunification efforts has no lawful basis without the

threshold finding of unfitness or conduct inconsistent with their constitutionally protected status as parents. "[A] finding that a parent is unfit or acted inconsistent with his or her constitutionally protected status is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017).

¶ 30 Nothing in the trial court's permanency planning order or its the rulings pronounced in open court supports the trial court's conclusory finding that the biological parents are unfit to parent Andrea or that their conduct is inconsistent with their constitutionally protected status. Absent such clear findings, based upon clear, cogent, and convincing evidence, demonstrating how Respondents are unfit or acted inconsistently with their constitutionally protected status, the trial court erred in awarding guardianship of Andrea to the foster parents.

B. Ceasing Reunification Efforts

¶ 31 **[2]** Respondents contend the trial court erred when it ceased reunification efforts because its findings of fact supporting ceasing efforts were not supported by the evidence.

1. Standard of Review

¶ 32 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re P.T.W.*, 250 N.C. App. 589, 594, 794 S.E.2d 843, 848 (2016) (citations omitted).

2. N.C. Gen. Stat. § 7B-906.2

¶ 33 Before a trial court may cease reunification efforts following any permanency planning hearing, it shall "make[] written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2019). To demonstrate efforts would be unsuccessful or contrary with the juvenile's well-being, the trial court is mandated to make written findings as to each of the following:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019).

¶ 34 With regard to its determination regarding reasonable efforts, the trial court made the following findings:

> It is futile and inconsistent with the juvenile's health, safety, and need for a permanent home within a reasonable period of time because: the Court finds that although the parents have completed and/or are participating in services, they cannot provide a home free of safety and protective issues. The Court acknowledges that the mother has given birth to another child since the last hearing and that child remains in the home of the parents; however, the Court finds that JCDSS is involved with that minor child and a juvenile petition is pending.
>
> . . .
>
> a. The Court finds that both parents continue to be inconsistent with their testimony concerning the domestic violence history in their relationship. While [Respondents] will in one moment acknowledge domestic violence in their relationship, they will thereafter deny the particular events previously found to have occurred by this Court. Additionally, the parents will indicate that they have a better understanding of domestic violence and their relationship, have not been able to fully articulate the same.
>
> b. The parents had been engaged in individual and couples counseling but have been discharged from the same as the practice does not wish to participate in legal actions. The parents have completed most of the services on their case plan; however, it was more of an action of "checking boxes" versus showing a change in behavior.
>
> c. The parents continue to lack an insight into the seriousness of this matter and the past domestic

violence. The parents, particularly the father, continue to externalize blame, especially towards JCDSS. Both parents come from prior domestic violence relationships. The Court finds that [Respondent-father] continues, with his therapist and other service providers, including JCDSS and this court, to attempt to rewrite the history.

d. The Court recognizes that a characteristic of domestic violence is the attempt to gain or maintain control over the other individual and the situation. In this case, the Court heard from four separate social workers who have had previous and current involvement with the parents concerning not only this child but the newest child, and all of the social workers expressed concerns regarding the ongoing controlling behavior of [Respondent-father]. [Respondent-father] continues to dominate conversations and situations, and further responds to questions that are addressed to [Respondent-mother] and she allows the same. [Respondent-father] continues to attempt to exert power and control over the various social workers with JCDSS. JCDSS has had repeated difficulty in attempting to meet with [Respondent-mother], separate and apart from [Respondent-father]. Although [Respondent-father] is not in the home, he monitors and controls the doorbell camera in the home to address visitors that come to the residence, including but not limited to the social workers attempting to meet with [Respondent-mother] alone. Additionally, the home has cameras inside the residence as well.

e. The Court recognizes that there has not been any reports of domestic violence since the last hearing; however, the Court continues to express concern as to whether or not the parents would in fact contact outside authorities if domestic violence did occur as a result of JCDSS involvement in this case and the Court's prior orders. The Court finds from a review of the court file, that the parents have been found by the Court to not be truthful or forthcoming by prior orders.

¶ 35 As discussed above, the district court's findings focused on the underlying issue in this case: domestic violence. Respondents consented to the initial adjudication of Andrea as neglected and dependent based upon domestic violence in the home. It is undisputed that the Respondents both engaged in services aimed toward addressing their history of domestic violence. JCDSS acknowledged there had been no reports of any new domestic violence incidents between the parents in 580 days at the time of the permanency planning hearing. JCDSS and the court were aware of G.W.'s birth and that JCDSS had allowed Respondents to take their infant son home from the hospital and to continue to live in their home.

¶ 36 JCDSS bears the burden of showing the futility of reunification efforts. As discussed above, JCDSS presented the testimony of four social workers. Not one single worker could identify a situation within the last twelve months where Respondents had engaged in domestic violence nor a situation where the police had to be called to respond or to break up an argument between the parties. No testimony contradicted Respondents' assertion that the security cameras were installed to provide home security and ability to monitor their newborn son, G.W.

¶ 37 Social worker Hylton's undisputed testimony was that Respondents had bonded with Andrea, that they loved her, that the visits went well and that they were engaged at visitations and continued to express their desire to be able to reunify with her and parent her. Hylton, who supervised the visits between Respondents and Andrea, testified she never saw anything in the visits that gave her any cause for concern.

¶ 38 The order contains no finding indicating the parents failed to make adequate progress within a reasonable period of time under the plan. The evidence presented shows the contrary, particularly considering JCDSS' dismissal of the petition regarding the younger child, G.W., who had lived with Respondents since his birth.

¶ 39 The trial court's 23 October 2019 permanency planning order documents the last incidence of domestic violence between Respondents eight months earlier in January 2019 and finds the parents failed to take responsibility for their actions. At the permanency planning hearing subject of this appeal, held over a year later, both Respondents testified to what treatment they had completed and how that treatment had resulted in changes in their relationship.

¶ 40 Record evidence shows despite filing an initial petition to have G.W. adjudicated neglected, JCDSS did not remove him from Respondents' care. In fact, JCDSS reduced the perceived risks in the home to moderate and G.W. remained in Respondents' care. All parties acknowledged in their briefs that JCDSS dismissed the juvenile neglect petition

concerning Andrea's sibling a *month before* the trial court entered its order here.

¶ 41 The trial court's insistence something more must be shown where Respondents have completed their case plan and where there have been no further allegations of domestic violence for more than a year is not clear, cogent, or convincing evidence to support the court's findings and conclusions. Here, hearings were significantly delayed due to COVID-19 related court closures and multiple continuances. During all that time, Respondents continued to remain engaged with JCDSS and Andrea. Respondents conceived a second child together. JCDSS began monitoring this child from birth and allowed this child to remain in the home with Respondents. It is wholly inconsistent and inexplicable for an infant to be left in the care of Respondents, but for Andrea to remain in a placement with the foster parents.

¶ 42 To cease reunification, the trial court's findings must include not only finding a lack of reasonable progress, but a lack of participation or cooperation with the plan, JCDSS and GAL. *See* N.C. Gen. Stat. § 7B-906.2(d)(2). The court made no finding indicating Respondents had refused to meet with or cooperate with JCDSS or the GAL. Evidence before the court reflected that the therapists, not Respondents, had refused to provide information to JCDSS. Evidence showed Respondents attempted to mediate this, but JCDSS had refused. Undisputed evidence showed Respondent-father repeatedly emailed JCDSS seeking guidance on what else they needed to do to be reunited with their daughter.

¶ 43 The court found Respondents "have not made themselves readily available to JCDSS or the GAL program." In fact, all evidence, and the trial court's other findings, showed Respondents had attended court sessions, visitations, and had allowed home visits by JCDSS. Testimony and other evidence showed Respondents emailed and contacted JCDSS repeatedly. Further, no evidence presented showed DSS had difficulty meeting with Respondent-mother separate from Respondent-father. This finding is wholly unsupported by evidence in the record and is stricken.

¶ 44 The trial court failed to make statutorily required findings of fact related to whether the parents demonstrated the degree of failure towards reunification necessary to support ceasing reunification efforts.

IV. Respondent-mother's Separate Arguments on Appeal

¶ 45 Respondent-mother also challenges the trial court's failure to allow a continuance pending adjudication of G.W.'s petition, refusal to recuse

itself and failure to verify the guardianship. Based upon our holdings, it is unnecessary to reach these issues.

V. Conclusion

¶ 46 The trial court's order does not contain findings supported by clear, cogent, and convincing evidence to support the conclusion the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents. Adequate findings do not support the conclusion to cease reunification efforts with Respondents. The court's order ceasing reunification efforts and awarding guardianship to nonparent foster parents is vacated. This matter is remanded for a prompt permanency planning hearing consistent with the parents' constitutionally protected rights to the care, custody, and control of their children and this opinion. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge STROUD and Judge INMAN concur.

LOST FOREST DEVELOPMENT, L.L.C. AND ITS SUCCESSORS, PETITIONER
v.
COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA20-860

Filed 2 November 2021

Administrative Law—OSHA citation—notice of contest—timeliness

An email communication by a workplace principal (petitioner) seeking to contest an OSHA citation was not timely where it was sent fifteen months after petitioner participated in an informal conference and then received a proposed settlement agreement from a health compliance officer. Petitioner was given multiple notices of a fifteen-day window in which he could declare in writing that he was contesting the citation but took no steps to submit a written contest or to seek legal advice and he admitted that he did not read the notices carefully. The Commissioner of Labor (respondent) neither waived nor forfeited the defense of untimeliness where a district supervisor for the Department of Labor called petitioner a year later to ask about the status of the citation, and where respondent docketed the late email as a "notice of contestment."

Appeal by petitioner from order entered 19 August 2020 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 5 October 2021.

Williams Mullen, by Michael C. Lord, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Stacey A. Phipps, for respondent-appellee.

TYSON, Judge.

¶ 1 Lost Forest Development LLC, ("Lost Forest") appeals from the superior court's order affirming the Order of the Review Commission dismissing Lost Forest's "Notice of Contest" for lack of timeliness. We affirm.

I. Background

¶ 2 Petitioner, Lost Forest is a limited liability company which operates a worksite in Henderson, North Carolina.

¶ 3 The North Carolina Commissioner of Labor ("Commissioner" or "NCDOL") enforces the Occupational Safety and Health Act of North Carolina ("OSHA"). *See* N.C. Gen. Stat. §§ 95-1, 126(m) (2019). The Commissioner enforces OSHA through compliance inspections. N.C. Gen. Stat. § 95-126(g) (2019).

¶ 4 The Commissioner conducted an inspection of Lost Forest's Henderson worksite on 20 April 2017. Lost Forest's principal/operator, Greg Sveinsson received at the time of the inspection, and signed a copy of the Employer and Employee Rights and Responsibilities Form (OSHA 59). This form provides in relevant part: "**Contestment of Citation and/or Penalty** – The employer may contest the citation by notifying the Occupational Safety and Health Division *in writing* within 15 working days following receipt of citation." (emphasis bold original and italics supplied). Lost Forest had no previous OSHA citations.

¶ 5 The Commissioner issued a Citation and Notification of Penalty ("Citation") on 15 June 2017. The Citation alleged five serious violations, which were immediately repaired, and carried a total proposed penalty of $7,800. Lost Forest received the Citation on 19 June 2017. The Citation provides in bold letters:

> 15 working days after you receive this Citation and Notification of Penalty . . . or 15 working days after

> you receive the results of the informal conference, the citation(s) and/or proposed penalty(ies) will become a final order of the North Carolina Occupational Safety and Health Review Commission and may not be reviewed by any court or agency, *unless you file a notice of contestment.* (emphasis supplied).

¶ 6 Lost Forest timely requested an informal conference as the first step in "contestment" of the Citation. A health compliance officer held the conference by phone with Sveinsson on 27 June 2017. Sveinsson verbally contested the Citation at the conclusion of the informal conference. No written "notice of contestment" followed this settlement meeting.

¶ 7 The health compliance officer sent Sveinsson a letter dated 28 June 2017 which included the proposed Settlement Agreement. The letter notified Sveinsson he needed "to submit your letter of contest" within 15 working days, if he did not accept the settlement offer. The letter further stated, it "shall serve as your notice of no change" and gave the contact information for NCDOL District Supervisor Bruce Miles for questions. Sveinsson took no further action upon receipt of the Commissioner's formal settlement offer for over a year.

¶ 8 NCDOL Supervisor Miles called Sveinsson on 22 October 2018 about the Citation. Sveinsson verbally reiterated Lost Forest wished to contest the Citation and confirmed his statements *via* email. The following day, Supervisor Miles forwarded the email chain with Sveinsson to the OSHA Review Commission ("Review Commission"). The Review Commission docketed it and deemed the communication to be a "Notice of Contest."

¶ 9 The Commissioner took no action on any procedural deficiency. In the interim, Lost Forest timely filed its Statement of Position with the Review Commission.

II. Procedural History

¶ 10 On 16 May 2019, the Commissioner moved to dismiss the notice of contest as untimely before the OSHA Review Commission. The Administrative Law Judge ("ALJ") denied the Commissioner's motion after an evidentiary hearing in an Order entered 11 July 2019.

¶ 11 The Commissioner appealed the ALJ's Order to the Review Commission in August 2019. The Review Commission reversed the ALJ's decision by Order of the Commissioners in November 2019 and dismissed Lost Forest's "notice of contestment" as untimely.

¶ 12 Lost Forest filed a Petition for Judicial Review in the Wake County Superior Court in December 2019. The trial court overruled Lost Forest's exceptions and affirmed the Order of the Review Commission. Lost Forest timely filed this appeal on 17 September 2020.

III. Jurisdiction

¶ 13 Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(l) (2019).

IV. Issues

¶ 14 Lost Forest argues: (1) its notice of contest is timely; (2) alternatively if not timely, the Commissioner forfeited the right to claim that Lost Forest did not properly contest the citation; and, (3) alternatively, good cause exists for Lost Forest to have its day in court.

¶ 15 Lost Forest also lists five other issues on appeal but fails to argue or provide authority for those issues in its brief.

> The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a) (2019). Those five unsupported and unargued issues "are deemed abandoned" on appeal. *Id.*

V. Standard of Review

¶ 16 "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-581, 281 S.E.2d 24, 29 (2012).

VI. Analysis

A. Timeliness of Notice of Contest

¶ 17 Lost Forest argues its "notice of contestment" is timely because on 27 June 2017 Sveinsson verbally notified the Commissioner's representative of its desire to contest during an irregular informal conference. Lost Forest argues verbal notice is sufficient because N.C. Gen. Stat. § 95-137(b)(1) (2019) does not require written notice:

> [T]he employer has *15 working days within which to notify the Director* that the employer wishes to:
>
> a. Contest the citation or proposed assessment of penalty; *or*
>
> b. Request an informal conference.
>
> Following an informal conference, unless the employer and Department have entered into a settlement agreement, the Director shall send the employer an amended citation or notice of no change. The employer has 15 working days from the receipt of the amended citation or notice of no change to notify the Director that the employer wishes to contest the citation or proposed assessment of penalty, whether or not amended. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that the employer requires an informal conference to be held or intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court. (emphasis supplied).

¶ 18 The North Carolina Administrative Code provides:

> An employer has 15 working days from receipt of a citation to notify the Director *in writing* that the employer wishes to either contest under the provisions of G.S. 95-137(b)(1) or request an informal conference.

13 N.C. Admin. Code 7A.0802 (2020) (emphasis supplied). "[S]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Brisson v. Santoriello*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000).

> In order to ensure "the orderly transaction of its proceedings", the Board is authorized to make Rules of Procedure and to follow the Rules of Civil Procedure when a situation arises that is not covered by its own Rules of Procedure. N.C.G.S. 95-135(d). The Board

> like any other court cannot function unless its Rules of Procedure are followed.

Master Woodcraft, Inc. OSHANC 2002-4109.

¶ 19 Here, Lost Forest received the Citation which contained two paragraphs explaining the right to contest:

> Right to Contest – You have the right to contest this Citation and Notification of Penalty now or after an informal conference.
>
> . . . .
>
> 15 working days after you received this Citation and Notification of Penalty (if you do not request an informal conference) or 15 working days after you receive the results of the informal conference, the citation(s) and/or proposed penalty(ies) will become a final order of the North Carolina Occupational Safety and Health Review Commission and may not be reviewed by any court or agency, unless *you file a notice of contestment*. (emphasis supplied).

¶ 20 Lost Forest requested and participated in an informal conference on 27 June 2017 and received a proposed settlement agreement on 8 July 2017. Lost Forest was given another 15 days to file "a notice of contestment" providing, "If this agreement is not signed and returned with three (3) working days, this letter shall serve as your notice of no change and you shall have fifteen (15) working days, from the receipt of this letter to *submit your letter of contest*." (emphasis supplied).

¶ 21 At the initial hearing, the hearing examiner inquired of Sveinsson, the principal of Lost Forest, whether he recalled reading the various notices sent to him. Sveinsson testified he, "called someone to help me fill it out because I really didn't understand it;" "I probably didn't go into great detail reading this;" and "I probably went straight to the numbers. I apologize. I just - - you know, I kind of skimmed through it, and signed it, and sent it back."

¶ 22 The North Carolina Administrative Code requires written notice of contest, and the Commissioner supplied reasonable notice to Lost Forest twice within the allotted time for the notice to be filed, and even complied with an extension request, once Lost Forest had received the settlement agreement. Sveinsson admitted he did not read the notices thoroughly and took no further actions. This argument is overruled.

B. Commissioner Accepting Notice of Contest

¶ 23 Lost Forest argues because Supervisor Miles called Sveinsson to confirm Lost Forest wanted to contest the Citation, and because the Commissioner docketed Lost Forest's email response as "a notice of contestment" in October 2018, the Commissioner waived or forfeited the procedural defense of untimeliness.

¶ 24 The NCDOL Field Operations Manual advises that a supervisor should not make further contact once notification is mailed to the employer. NCDOL is an agency with respect to the Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-1(c) (2019). "The APA defines "Rule" as "any agency regulation, standard, or statement of *general applicability* that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency." *Wal-Mart Stores E., Inc. v. Hinton*, 197 N.C. App. 30, 56, 676 S.E.2d 634, 652 (2009). A rule is not a statement "concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies." *N.C. Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 28–29, 609 S.E.2d 407, 416 (2005) (citation omitted).

¶ 25 Supervisor Miles' notifying Lost Forest regarding the notice of contest more than a year after last contact was an action contrary to an administrative precaution provided in the NCDOL Field Operations Manual and is not a rule by which the Commissioner, the Review Commission, or this Court is bound. *See Weekley Homes, L.P.*, 169 N.C. App. at 31, 609 S.E.2d at 416 (holding "the Operations Manual is a non-binding interpretive statement, not a rule requiring formal rule-making procedures . . . the Operations Manual merely established guidelines that directed OSHA[.]").

¶ 26 The record clearly shows after Lost Forest received notice of the Citation it had 15 working days to provide a written contestment. The Commissioner received the "contestment" email *15 months after* Lost Forest's time to file notice of contest had ended. Lost Forest references N.C. Gen. Stat. § 150B-51(b)(5) (2019) (stating "The court . . . may . . . reverse . . . if . . . decisions are: unsupported by substantial evidence[.]"). Overwhelming evidence in the record supports the contention that Lost Forest was on notice of the deadlines to contest the Citation.

¶ 27 Lost Forest provides no applicable case law, statute, or rule to show the Commissioner's acceptance of the notice of contest or Supervisor

Miles' late contact is fatal to Commissioner's Motion to Dismiss. The Commissioner, within the authority granted by the legislature, provided multiple notices to Lost Forest. Lost Forest's argument that N.C. Gen. Stat. § 95-137(b)(1) does not require written notice is without merit when considered with the other North Carolina Administrative Code and statutory requirements. The trial court properly affirmed the Review Commission's conclusion that Lost Forest did not file a timely notice of contest. Petitioner's argument is overruled.

C. Good Cause for Lost Forest's Day in Court

¶ 28 Lost Forest argues good cause exists to allow its notice of contest, and it should be permitted pursuant to N.C. Gen. Stat. § 1A-1, Rule 60.

¶ 29 If Lost Forest had filed a Rule 60(b) Motion, the Rule potentially provides relief from a judgment or order only in limited circumstances, including for mistake, inadvertence or excusable neglect. The Supreme Court of the United States supplies a test for excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 123 L. Ed. 2d. 74, 89-90 (1993).

> [W]hat sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission . . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id.

¶ 30 In *Best Rate Tree & Lawn Serv.*, the employer failed to comply with OSHA reporting requirements. *Best Rate Tree & Lawn Serv.*, OSHANC 2006-4672. The safety compliance officer attempted to contact the employer many times. Finally, the officer and the employer met on 19 September 2006 and the employer received his OSHA 59 form with instructions to file his notice of contest. The citation was issued 16 October 2006. The employer filed a notice of extension to contest on 9 November, two days after the deadline. The employer did not contest until 14 December 2006. The Review Commission found:

> The [employer] has failed to prove by the greater weight of the evidence that it should be allowed to contest the citations . . . There is no evidence that [the

> employer] conducted the handing (sic) of this matter with the degree of care that a business person gives his or her important business matters.

Id.

¶ 31 Sveinsson did not act as a reasonable business person. He neither paid the penalty he sought to contest nor contacted the NCDOL for more than a year. Lost Forest never contacted the NCDOL to ask questions, to discuss payment, or to seek additional time to respond or to verify his notice of contest was timely received.

¶ 32 Lost Forest's made no efforts to submit any written contest and admittedly did not give the Citation the attention it deserved. Supervisor Miles' late contact with Lost Forest is not determinative of the facts before us. Petitioner's notice of contest was officially filed on 22 October 2018, 15 months after the settlement agreement. Lost Forest has failed to show by greater weight of the evidence it had acted in good faith.

VII. Legal Inadequacy

¶ 33 Lost Forest failed to respond to the Motion to Dismiss within ten days from service as is required by OSHRC Rule .0308(a): "parties upon whom a motion is served shall have 10 days from service to file a response." 24 N.C. Admin. Code 3.0308 (2020).

¶ 34 Lost Forest argues it was originally *pro se*, a small business without a legal department, had no frame of reference to contest OSHA, believed it had satisfied the requirements, and was prejudiced by the trial court's order. Being fully cognizant of these asserted disadvantages, Lost Forest did not obtain counsel until receiving the Notice of Appearance to OSHA Review Commission on 31 May 2019.

¶ 35 Evidence shows Sveinsson "was not a prudent business person in the handling of this matter, which he admitted during the hearing." *Best Rate Tree & Lawn Serv*, OSHANC 2006-4672. Petitioner's argument is overruled.

VIII. Finding of Fact 6

¶ 36 Lost Forest argues the trial court failed to comply with N.C. Gen. Stat. § 150B-51(b)(5) because none of the notices specifically said its failure to respond would result in a final order. That language is *verbatim* on the Citation and on the cover letter to the proposed Settlement Agreement. The Citation provided in bold letters if Lost Forest did not file a notice of contest in 15 days the Citation "will become a final order." Further, the settlement letter notified Sveinsson that if he did not accept the proposed settlement offer, he needed "to submit your

letter of contest" within 15 working days. The letter further provided, it "shall serve as your notice of no change." This argument has no merit.

IX. Inconsistencies in Statute & Rules of Required Form of Notices

¶ 37 Several of Lost Forest's arguments center upon ambiguities and inconsistencies of the unspecified and varying type of notices required, whether verbal or written, in the statutes and rules governing and, forms from the Commissioner, it is bound by as a small *pro se* business. The OSHA 59 Form Sveinsson signed provides the employer may contest the citation by notifying the Occupational Safety and Health Division *in writing* within 15 working days following receipt of the citation. The Commissioner received Lost Forest's "Contestment" email *15 months after* Lost Forest's time to file notice of contest had ended.

¶ 38 The judicial branch and governmental agencies at all levels are transitioning away from requiring written "hard" copies and service documents to electronic notices and filing in the trial and appellate divisions. Agencies are encouraged to review their controlling statutes, rules, and forms for consistency of notice and service requirements prevalent in electronic communications and interactions with constituents and consumers. *See* N.C. Gen. Stat. § 1A-1, Rule 5 (b)(1)(a) ("Service may also be made on the attorney by electronic mail (e-mail) to an e-mail address of record with the court in the case. Such e-mail must be sent by 5:00 P.M. Eastern Time"); N.C. Gen. Stat. § 1A-1, Rule 5(e)(2) ("If electronic filing is available in the county of filing, filing shall be made in accordance with Rule 5 of the General Rules of Practice for the Superior and District Courts.").

X. Conclusion

¶ 39 The matters of timeliness are the only issues argued in Lost Forest's brief and before this Court. Under *de novo* review, substantial evidence supports the trial court's findings and conclusions to affirm the Review Commission's decision concluding Lost Forest's written notice of contest filed 15-16 months after the deadline should be dismissed as untimely. Lost Forest has failed to show the Commissioner's docketing of Lost Forest's notice of contest is a procedural forfeiture or waiver to challenge. Good cause has not been shown to entitle Lost Forest to a Rule 60(b) review. We affirm the trial court's order. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

PHILLIPS v. MacRAE

[280 N.C. App. 184, 2021-NCCOA-588]

T. ALAN PHILLIPS AND ROBERT WARWICK, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE MARITAL TRUST CREATED UNDER SECTION 2 OF ARTICLE IV OF THE HUGH MACRAE II REVOCABLE DECLARATION OF TRUST; AND ROBERT WARWICK, HUGH MACRAE III, AND NELSON MACRAE, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE FAMILY TRUST CREATED UNDER SECTION 3 OF ARTICLE IV OF THE HUGH MACRAE II REVOCABLE DECLARATION OF TRUST WHICH FAMILY TRUST IS THE SOLE REMAINDER BENEFICIARY OF THE MARITAL TRUST, PLAINTIFFS

v.

EUNICE TAYLOR MACRAE AND MARGUERITE BELLAMY MACRAE, IN HER CAPACITY AS A BENEFICIARY OF THE FAMILY TRUST, DEFENDANTS

No. COA20-903

Filed 2 November 2021

1. Civil Procedure—denial of motion to dismiss—subsequent motion for summary judgment allowed—permissible due to different standards

The denial of motions to dismiss did not preclude a judge—whether the same or a different judge—from later allowing the same party's motion for summary judgment, because the two types of motions are evaluated under different standards and present separate legal questions.

2. Trusts—marital trust—100% fully countable trust—statutory requirements

A marital trust set up to provide for decedent's spouse qualified as a 100% fully countable trust under N.C.G.S. § 30-3.3A(e)(1) where the trust was currently controlled by nonadverse trustees and the trust's grant of permissive power to the trustees regarding distributions of the principal was allowed under a plain reading of the statute. Therefore, the trial court erred by granting summary judgment to the spouse in the trustees' declaratory judgment action, which they filed after the spouse filed an elective share claim and challenged the extent to which the marital trust affected her claim.

Appeal by plaintiffs from order entered 25 August 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 21 September 2021.

Womble Bond Dickinson (US) LLP, by Lawrence A. Moye, IV and Elizabeth K. Arias, and Hogue Hill LLP, by Patricia C. Jenkins, for plaintiffs-appellants.

Johnston, Allison & Hord, P.A., by Kimberly J. Kirk and David T. Lewis, and Law Office of Susan M. Keelin, PLLC, by Susan M. Keelin, for defendants-appellees.

TYSON, Judge.

¶ 1 T. Alan Phillips ("Phillips") and Robert Warwick ("Warwick") in their capacities as co-Trustees of the Marital Trust created under section 2 of Article IV of the Hugh MacRae II Revocable Declaration of Trust; and Warwick, Hugh MacRae, III, and Nelson MacRae, in their capacities as co-Trustees of the Family Trust created under Section 3 of Article IV of the Hugh MacRae II Revocable Declaration of Trust which Family Trust is the sole remainder beneficiary of the Marital Trust (collectively "Plaintiffs") appeal from an order entered 26 August 2020 granting summary judgment in favor of Eunice Taylor MacRae and Marguerite Bellamy MacRae in their capacities as beneficiaries of the Family Trust (collectively "Defendants"). We reverse summary judgment and remand.

I. Background

¶ 2 Hugh MacRae II ("Decedent") died on 8 October 2018. Decedent was survived by his second wife, Eunice Taylor MacRae ("Eunice"); his three adult children from his first marriage: Hugh MacRae III ("Hugh"), Nelson MacRae ("Nelson"), Rachel Cameron MacRae Gray ("Rachel"); and his adult child from his second marriage to Eunice, Marguerite Bellamy MacRae ("Marguerite").

¶ 3 Decedent's Last Will and Testament dated 31 January 2014 bequeathed his residuary estate to the Trustees of his Revocable Trust. The Revocable Trust was created under an Amended Revocable Declaration of Trust dated 31 January 2014. Decedent created this Revocable Trust that upon his death was to be divided into two testamentary trusts: a Marital Trust and a Family Trust. The Marital Trust was to be administered under Section 2 of Article IV of the Revocable Trust Agreement for the benefit of Eunice during her lifetime. The Marital Trust terminates upon Eunice's death. The Trustees of the Marital Trust are Phillips and Warwick.

¶ 4 The Trustees of the Family Trust are Hugh, Nelson, and Warwick. The Family Trust was to be administered under Section 3 of Article IV for the equal benefit of Decedent's four children and their descendants. The Family Trust for the benefit of the four children is the sole remainder beneficiary of the Marital Trust.

¶ 5 Plaintiffs assert Decedent articulated and established two estate planning goals: (1) to ensure Eunice was well provided for upon his death; and, (2) to ensure all four of his children were treated equally following his death. Decedent's stated fear was that any of his assets left outright to Eunice would be left solely to her daughter, Marguerite, upon her death, to the exclusion of his other three children from his first marriage. Decedent also believed Eunice would challenge his estate plan, if any legal basis existed to do so.

¶ 6 Decedent along with his accountant, Warwick, and estate planning attorney, Talmage Jones, sought to accomplish his testamentary plan and intent and to prevent this eventuality from occurring. Jones drafted the Marital Trust to be a 100% fully countable trust to satisfy a spousal share pursuant to N.C. Gen. Stat. § 30-3.3A(e)(1) (2019).

¶ 7 Decedent informed Warwick that Jones "is checking results to be certain the will exceeds N.C. laws for spouses['] share and would not be likely to be contested." Jones later informed Decedent that Eunice's statutory spouse's share could be satisfied by a devise into a marital trust. After Decedent's death, Eunice challenged the Decedent's estate plan. She filed an elective share claim against the estate to challenge the value assigned to the Marital Trust in calculating the amount of any elective share to which she may be entitled. Eunice asserted the Marital Trust did not meet the requirements to be counted at 100% of its value towards her elective share.

¶ 8 Plaintiffs filed a claim for a declaratory judgment: (1) seeking a declaration that the terms of the Marital Trust met the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% countable trust as property passing to the surviving spouse under N.C. Gen. Stat. § 30-3.2(3c) (2019) for calculation of an elective share; (2) seeking an order pursuant to N.C. Gen. Stat. § 36C-4-412 (2019) to modify the terms of the Marital Trust to be a 100% fully countable trust due to circumstances not anticipated by Decedent; and, (3) seeking an order pursuant to N.C. Gen. Stat. § 36C-4-415 (2019) modifying the terms of the Marital Trust to be a 100% fully countable trust to conform to Decedent's intent.

¶ 9 On 8 July 2019, Eunice filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(6), and 12(b)(7) (2019). The trial court denied the motions but ordered Marguerite to be added as a party to the litigation. Upon cross motions for summary judgment, the trial court granted Defendants' motion for summary judgment on all claims on 26 August 2020. Plaintiffs appealed.

II. Jurisdiction

¶ 10 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 11 Plaintiffs argue the trial court erred by granting Defendants' motion for summary judgment on all claims.

IV. Motion for Summary Judgment

A. Standard of Review

¶ 12 North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show they are "entitled to a judgment as a matter of law" and "there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

¶ 13 A material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). When reviewing the evidence at summary judgment: "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted).

¶ 14 "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

¶ 15 On appeal, "[t]he standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. 9 September 2019 Order

¶ 16 **[1]** In the 9 September 2019 order, the trial court denied Defendants' Rules 12(b)(1), 12(b)(6), and 12(b)(7) motions. Plaintiffs argue this order finds the terms of the Marital Trust are ambiguous. Plaintiffs assert the 26 August 2020 order granting summary judgment to Defendants improperly overrules the legal conclusion of another judge.

¶ 17 Our Supreme Court has held: "no appeal lies from one Superior Court judge to another, that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge, previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003).

¶ 18 The trial court's standards to rule upon a Rule 12(b)(6) motion to dismiss and a Rule 56 motion for summary judgment are different and present separate legal questions. *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 255 (1978). "The test on a motion to dismiss under Rule 12(b)(6) is whether the pleading is legally sufficient." *Id.* at 692, 247 S.E.2d at 256. The test for a Rule 56 motion for summary judgment that is "supported by matters outside the pleadings is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Id.*

¶ 19 In *Barbour*, this Court held: "the denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as is provided in Rule 56." *Id.*

¶ 20 The subsequent allowing of a motion for summary judgment where a prior Rule 12(b)(6) motion was denied by the same or by a different judge is permitted by our longstanding precedents. One superior court judge did not overrule another superior court judge in this ruling. Plaintiffs' argument is overruled.

C. N.C. Gen. Stat. § 30-3.3A(e)(1) Requirements

¶ 21 **[2]** Plaintiffs argue the trial court improperly found the Marital Trust was not a 100% fully countable trust within the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1). N.C. Gen. Stat. § 30-3.3A(e)(1) provides when valuing a partial and contingent interest passing to the surviving spouse:

> The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and if the terms of the trust meet the following requirements:
>
> a. During the lifetime of the surviving spouse, the trust is controlled by one or more nonadverse trustees.
>
> b. The trustee shall distribute to or for the benefit of the surviving spouse either (i) the entire net income of the trust at least annually or (ii) the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
>
> c. The trustee shall distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
>
> d. In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.

N.C. Gen. Stat. § 30-3.3A(e)(1) (2019). Decedent was the settlor of the trust. The terms of the Marital Trust are for the exclusive benefit of his surviving spouse, Eunice, during her lifetime.

1. Nonadverse Trustees

¶ 22 Decedent appointed Phillips and Warwick as trustees of the Marital Trust. N.C. Gen. Stat. § 30-3.3A(e)(1)a provides and requires, "During the lifetime of the surviving spouse, the trust is controlled by one or more nonadverse trustees." The Marital Trust currently has nonadverse trustees in Phillips and Warwick. Defendants argue the trustees of the Marital Trust could become adverse in the future and asserts no requirement in the trust documents requires nonadverse trustees. Plaintiffs

argue Phillips and Warwick could serve until Eunice's death, but if they should resign or die, a successor trustee could be substituted, who is also nonadverse to comply with the statute. N.C. Gen. Stat. § 30-3.3A(e)(1)a. Speculation about a purported future adverse trustee violation does not prevent the Marital Trust with its current trustees from qualifying under this statutory requirement. Defendants' argument on this issue is without merit.

2. Trustee Discretion Over Principal Distributions

¶ 23 Defendants argue the Marital Trust does not require principal distributions pursuant to N.C. Gen. Stat. § 30-3.3A(e)(1)c. The statute provides: "The trustee shall distribute to *or for the benefit of* the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, *in its discretion*, determines necessary for the health, maintenance, and support of the surviving spouse." N.C. Gen. Stat. § 30-3.3A(e)(1)c (emphasis supplied).

¶ 24 The Marital Trust provides:

> My Trustees may distribute all or any portion of the principal of the trust to my wife in such amounts and at such times as my Trustees may determine to be necessary and prudent. I admonish my wife's trustees to make all reasonable efforts to preserve the principal of her trust, invading principal only when absolutely necessary for essential things, but not for unusual or unnecessary luxury items.

N.C. Gen. Stat. § 30-3.3A(e)(1)c reads "shall make", while the terms of the Marital Trust state "may make." Plaintiffs concede the Marital Trust provides the Trustees with discretion for permissive and not mandatory distributions of the principal, but assert this language satisfies the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1)c, citing *First Nat'l Bank of Catawba Cty. v. Edens*, 55 N.C. App. 697, 286 S.E.2d 818 (1982) for support.

¶ 25 To resolve the parties' arguments, we must first determine whether invasion of principal distributions is mandatory or permissive under N.C. Gen. Stat. § 30-3.3A(e)(1)c. In reviewing this statute, we are guided by several well-established principles of statutory construction.

¶ 26 "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297,

507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

¶ 27 "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks and ellipses omitted) (citations omitted).

¶ 28 The plain meaning of the statute is clear and unambigious. N.C. Gen. Stat. § 30-3.3A(e)(1) contains permissive language giving the trustee discretion how and when to make distributions of principal and the amount of the distribution. This is consistent with this Court's holding in *First Nat'l Bank*, where this Court held the word "shall" plus trustee discretion creates a permissive power. *First Nat'l Bank*, 55 N.C. App. at 702, 286 S.E.2d 821.

¶ 29 N.C. Gen. Stat. § 30-3.3A(e)(1)c provides for permissive or discretionary distributions and the terms of the Marital Trust permit permissive distributions. The sub-sections b and c of the statute also limit and provide the Trustee "in its discretion," to "determine [what is] necessary for the health, maintenance, and support of the surviving spouse." *Id.* The trial court erred in awarding summary judgment to Defendants and holding as a matter of law the trust did not meet the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% fully countable trust against a surviving spouse's elective share.

3. Distributions for Surviving Spouse's Benefit

¶ 30 N.C. Gen. Stat. § 30-3.3A(e)(1)b provides the trustees "shall make" distributions for the surviving spouse's benefit when "in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse." The Trustees' obligations thereunder are compliant with N.C. Gen. Stat. § 30-3.3A(e)(1)b. The Marital Trust required the net income of the trust to be distributed to Eunice at least quarter annually. As consistent with the Decedent's and settlor of the Marital Trust's expressed intent, the Trustees of the Marital Trust have the discretion to make distributions for Eunice's benefit so long as the distributions are "necessary for the health, maintenance, and support of the surviving spouse." *Id.*

4. Other Means of Support

¶ 31 N.C. Gen. Stat. § 30-3.3A(e)(1)d provides the trustee can in their discretion take into consideration other income assets and other means of support of the surviving spouse. Here, the terms of the Marital Trust provide the Trustees have the discretion to consider "any other means of support available to my wife." The Marital Trust meets the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% fully countable trust. Because we reach this conclusion, it is unnecessary to and we do not reach Plaintiffs' arguments under N.C. Gen. Stat. § 36C-4-412 for modification or under N.C. Gen. Stat. § 36C-4-415 for reformation.

V. Conclusion

¶ 32 The trial court erred in granting summary judgment for Defendants. The Marital Trust meets all statutory requirements and named nonadverse trustees presently and in perpetuity because of the Trustee's rights to appoint another nonadverse trustee. N.C. Gen. Stat. § 30-3.3A(e)(1)c provides for permissive distributions of principal, while the terms of the Marital Trust also provide for permissive distributions. The Marital Trust meets the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% fully countable trust. The order of the trial court is reversed and the cause is remanded for further proceedings as are consistent with this opinion. *It is so ordered.*

REVERSED AND REMANDED.

Judges GORE and JACKSON concur.

POYTHRESS v. POYTHRESS

[280 N.C. App. 193, 2021-NCCOA-589]

MICHAEL BRANDON POYTHRESS, PLAINTIFF
v.
LISSETE R. POYTHRESS, DEFENDANT

No. COA20-137-2

Filed 2 November 2021

Supersedes 275 N.C. App. 651, 854 S.E.2d. 27 (2020)

1. Divorce—premarital agreement—real estate—consideration for acquisition

In a dispute over real property subject to a premarital agreement, the trial court erred in finding that the husband had provided all the consideration for the acquisition of the real property in the couple's holding company for investment real estate (POGO, which the husband and wife held in equal shares), where three properties had been originally titled to the husband and wife personally, two more were acquired directly by POGO through lines of credit and loans guaranteed by both the husband and wife, and another was contributed to POGO by the husband and then used to secure a cash-out mortgage guaranteed by both the husband and wife.

2. Divorce—premarital agreement—real estate—gift to marriage

In a dispute over real property subject to a premarital agreement, the trial court erred in finding that clear, cogent, and convincing evidence existed showing that the husband did not intend to gift to the marriage his separate assets that were used to acquire the three properties that were used to initially capitalize the couple's holding company for investment real estate (POGO, which the husband and wife held in equal shares). The only evidence that the husband did not intend a gift was his self-serving testimony that he did not subjectively intend to do so, and overwhelming evidence supported the opposite conclusion.

3. Divorce—premarital agreement—real estate—presumption of gift to marriage

The trial court's order in a dispute over real property subject to a premarital agreement was vacated and remanded for further findings as to a beach house that the husband had acquired in his own name with his own assets and later re-titled to both himself and his wife as tenants by the entirety. While there was a presumption that the husband intended a gift to the marriage, other evidence in the record might overcome the presumption.

4. Divorce—premarital agreement—real estate—factual findings

The trial court's order in a dispute over real property subject to a premarital agreement was vacated and remanded for further findings as to several companies and parcels of real estate in Peru, where the findings were unclear as to the ownership of the assets.

Appeal by Defendant from judgment entered 8 August 2019 by the Honorable Ned Mangum in Wake County District Court. Heard in the Court of Appeals 21 October 2020. Opinion filed 31 December 2020. Motion for Reconsideration allowed 12 February 2021.

Fox Rothschild LLP, by Michelle D. Connell, for Plaintiff-Appellee.

John M. Kirby for Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant Lissete R. Poythress ("Wife") appeals portions of a judgment in favor of Plaintiff Michael Brandon Poythress ("Husband"), declaring certain real estate, a real estate-owning limited liability company, and other assets to be his sole property based on the terms of their premarital agreement (the "Premarital Agreement" or "Agreement"). We filed an opinion on 31 December 2020. Having allowed Defendant's Motion to Reconsider, we hereby file this opinion to replace our 31 December 2020 opinion. Judge Carpenter participated in the reconsideration of our prior opinion as Judge Young's term ended on 31 December 2020.

I. Background

¶ 2 Husband and Wife were married in 2010. Husband had recently divorced his first wife, a marriage which produced three children. Though he had significant assets, he lost much of his wealth in that divorce. This experience prompted Husband to seek the Agreement with Wife to protect his assets should his second marriage also end in divorce. Accordingly, just prior their marriage, Husband and Wife entered into the Premarital Agreement.

¶ 3 Wife was also previously married and had two children of her own. She, however, did not have significant assets when she married Husband.

¶ 4 During their marriage, Husband and Wife acquired several properties which, at the time of their separation, were titled *either* to Wife, to Husband and Wife jointly, or to an entity which they jointly owned. The consideration paid to acquire these properties came either from

Husband's separate property or from loans guaranteed by both Husband and Wife.

¶ 5 Husband and Wife separated in 2017.

¶ 6 Husband brought this action claiming that, based on the Agreement, certain assets acquired during the marriage are solely his, notwithstanding how the ownership of the assets may be titled/documented. Wife, though, claims that the assets are marital and should be divided equally, as the Agreement provides that all marital property is to be split equally upon separation/divorce.

¶ 7 After a hearing on the matter, the trial court entered an order declaring Husband as the sole owner of the assets and directing Wife to execute documents to transfer her legal interest therein. The trial court also awarded Husband attorneys' fees, based on its finding that Wife had breached the Agreement by not previously executing the documents. Wife appealed.

II. Argument

¶ 8 The trial court's order covered all property owned by Husband and/or Wife. Wife's brief on appeal takes issue with how the trial court distributed *most* of these assets. As to the assets about which Wife makes no argument, the order of the trial court is affirmed. The assets about which Wife does make an argument on appeal (the "disputed assets") are as follows:

> Ownership Interest in Pogo, LLC- POGO, LLC, ("POGO") is a limited liability company that Husband and Wife set up during the marriage. The parties established POGO to serve as the holding entity for certain investment real estate acquired during their marriage. All documentation in evidence, including POGO tax returns, show that POGO was established and owned during the marriage by both Husband and Wife in equal shares.
>
> Beach House- Husband purchased this property in his own name, using his separate assets to do so. However, sometime prior to separation, Husband re-titled the beach house to himself and Wife as tenants by the entirety.
>
> Peru Assets- Husband purchased various assets in Peru, Wife's home country, during the marriage. Wife

> challenges the trial court's order concerning some of the Peruvian assets, specifically the assets in which either she or both she and Husband are listed as the owner(s). Wife does not challenge the trial court's determination regarding Peruvian assets where she was not listed as an owner.

¶ 9 We hold that the trial court erred in its order in two important respects. First, the trial court erred in finding that Husband had provided all the consideration for the acquisition of many of the disputed assets. The trial court relied on this finding in its determination that the assets were Husband's alone. Second, the trial court erred in finding clear, cogent, and convincing evidence that Husband did not intend to gift to the marriage his separate assets used to acquire the disputed assets. We address each argument in turn.

A. Consideration Provided by Wife

¶ 10 **[1]** The trial court erroneously found that Husband provided *all* consideration to acquire the disputed properties. This is simply not true, at least with respect with POGO, as explained below.

¶ 11 The POGO assets were acquired as follows:

¶ 12 As of the parties' date of separation, POGO owned six investment real estate properties, all located in North Carolina.

¶ 13 Three of these six properties were acquired early in the marriage and originally titled to Husband and Wife, personally. All three properties were acquired with consideration provided by Husband from his separate property. Sometime after these three properties were acquired, Husband and Wife set up POGO, after which *they executed deeds*, re-titling these properties to POGO.

¶ 14 The fourth and fifth properties were acquired directly by POGO through lines and loans *guaranteed by both Husband and Wife*. POGO first obtained a line of credit, secured by the original three properties and *guaranteed by both Husband and Wife*. POGO then purchased the fourth and fifth properties with proceeds from this line and from a mortgage *guaranteed by both parties*.

¶ 15 The sixth property was contributed to POGO by Husband. Husband came to own this sixth property, a single-family residence, in his own name in resolution of claims from his first divorce. He re-titled that home to POGO. POGO then obtained a cash-out mortgage loan secured by this property and *guaranteed by both parties*.

¶ 16 The trial court failed to recognize that Wife provided consideration for the POGO assets in two ways. First, the trial court failed to recognize that the act of personally guaranteeing a loan used to acquire an asset is, itself, consideration. Here, Wife personally guaranteed the lines/loans used to acquire several of the POGO properties. Under the Agreement, Wife had no obligation to personally guarantee any loan concerning Husband's separate property. Rather, Wife was only required under the Agreement to pledge her marital interest, if any, in Husband's separate properties for such loans. However, by personally guaranteeing POGO loans, *Wife's* separate property interests were put at risk. Though the risk to her separate assets may have been slight, said risk *is* consideration. *Young v. Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been said, is for the parties to consider at the time of making the contract, and not for the court when it is sought to be enforced.").

¶ 17 And, second, the three properties used to initially capitalize POGO were owned by Husband and Wife. Wife signed her tenancy by the entirety interest in said properties to POGO. Though Husband may have provided the consideration to acquire these three properties prior to the establishment of POGO, said properties were jointly owned by Husband and Wife at the time they were deeded over to POGO and constitute some consideration.

B. Gifts to Marital Estate by Husband

¶ 18 To the extent that the disputed properties were acquired with Husband's separate property, the trial court found that "clear, cogent, and convincing" evidence existed to rebut any presumption that Husband intended to gift these separate assets to the marital estate. In so finding, the trial court relied largely on the terms of the Agreement. We conclude that the trial court erred in relying on the terms of the Agreement as evidence to rebut the gift presumption, as explained below.

¶ 19 The ownership of property upon separation/divorce is typically resolved through application of our equitable distribution statute, codified in Section 50-20 of our General Statutes. However, parties may contractually agree for the mechanics of our equitable distribution statute to not apply. N.C. Gen. Stat. § 50-20(c) (2017).

¶ 20 Here, by executing the Agreement, Husband and Wife contractually agreed that our equitable distribution statute would not apply. Indeed, the Agreement expressly provides how all their property would be distributed upon separation and that the equitable distribution statute

would not apply to determine the distribution. *See Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (recognizing that "[o]ur statutes also contain a mechanism whereby the parties to a marriage may forego equitable distribution and decide themselves how their marital estate will be divided upon divorce").

¶ 21 The evidence showed and the trial court found that, *on paper*, all the disputed assets were owned by Husband and Wife jointly. Specifically, the POGO tax returns and company documents reflect that Husband and Wife are both members of POGO, with each owning a 50% interest therein; the recorded deed for the beach house lists Husband and Wife as owners as tenants by the entirety; and the documentation for the Peru properties show that they are all jointly owned by Husband and Wife. *See Davis v. R.R.*, 227 N.C. 561, 566, 42 S.E.2d 905, 909 (1947) (holding that income tax return is competent evidence); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 443, 278 S.E.2d 897, 907 (1981) (holding that information reported on tax returns are "highly relevant" evidence of a fact to be proved).

¶ 22 We note that the equitable distribution statute and the cases decided thereunder are not directly on point to resolve the "gift" question, as the parties have agreed that the matter is not to be subject to that statute.

¶ 23 Under our common law, a valid gift (whether conditional or unconditional) occurs when there is (1) donative intent and (2) actual or constructive delivery. *Halloway v. Wachovia*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992).

¶ 24 Our Supreme Court has held that—as a matter of common law, apart from our equitable distribution statute—where a spouse allows his separate assets to be used to acquire property titled to both spouses as tenants by the entirety or to the other spouse, it is presumed that the spouse supplying the consideration has made a gift to the marriage; it is not presumed that the transaction creates a resulting trust in favor of the spouse supplying the consideration. *Mims v. Mims*, 305 N.C. 41, 53-54, 286 S.E.2d 779, 788 (1982). Our Supreme Court further held that this gift presumption may only be overcome by "clear, cogent, and convincing" evidence. *Id.* at 57, 286 S.E.2d at 790.

¶ 25 We are aware that our equitable distribution statute provides that the gift presumption may be overcome by "the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1). But, again, this present dispute is not governed by that statute.

¶ 26 The trial court erroneously relied on the Agreement as evidence to rebut the marital gift presumption, finding that Husband's "procurement

of and reliance on the definitions of separate property in the Premarital Agreement is clear, cogent, and convincing evidence sufficient to rebut any such presumption."

¶ 27 The Agreement provides that property acquired during the marriage by Husband with his separate assets would be solely his upon separation. That is, the Agreement provides that if Husband and Wife divorce, the property owned by Husband prior to marriage and any property he acquired during marriage using his separate property would be his separate property. Wife waived all marital interest in Husband's property, whether the marriage ended in divorce or Husband's death.

¶ 28 However, Paragraph 21 of the Agreement provides that Husband could make gifts to Wife or to the marital estate during the marriage:

> 21. VOLUNTARY TRANSFERS PERMITTED. The purpose of this Agreement is to limit the rights of each party in the assets of his or her spouse in the event of death, separation or divorce, but this Agreement shall not be construed as placing any limitation on the rights of either party to make voluntary *inter vivos* and/or testamentary transfers of his or her assets to his or her spouse.
>
> In the event that [Husband] shall create [ ] tenancies by the entirety, or otherwise so establish assets that upon [his] death[,] it shall be presumed that [Husband] presumed that [he] intended such passage and [that Wife] shall then become the sole and uncontested owner of such asset or assets, anything herein contained to the contrary notwithstanding.
>
> . . . [It is] the wish of each party that any affirmative action taken by either after the signing of this Agreement, whether it be testamentary or in the creation of joint assets, shall override the releases and renunciations herein set forth.
>
> [T]he parties acknowledge that no representation or promises of any kind whatsoever have been made by either of them to the other with respect to any such transfers, gifts, contracts, conveyances, or fiduciary relationships.

The language in this Paragraph 21 is unambiguous: The first section recognizes that Husband may make gifts of his separate property during the marriage to Wife.

¶ 29 The second and third sections indicate that Husband could transfer property to the marital estate, which would then become "solely" Wife's property upon his death, notwithstanding her waiver of her marital interests in his estate provided by North Carolina law. These sections, however, do *not* state that such transfers to the marital estate by Husband were not otherwise to be deemed a present, unconditional gift to the marital estate. Rather, the third section of Paragraph 21 expressly provides that any affirmative action by Husband to create joint assets during the marriage "shall override [Wife's] releases and renunciations" in the Agreement.

¶ 30 And the fourth section affirms there was no understanding at the time the Agreement was executed between the parties with respect to any transfers that might be made during the marriage.

¶ 31 In sum, there is nothing in the Agreement stating that property titled to the parties jointly was to be deemed Husband's separate property upon their separation/divorce. It may be that Husband misunderstood the terms of the Agreement. But we must look to the terms of the Agreement and the actions of the parties concerning the Agreement to determine its meaning. We now consider the evidence concerning each asset category.

¶ 32 **[2]** POGO-The tax returns and other documentation concerning POGO indicated that each party owned a 50% interest. Indeed, Husband testified to this fact. He also testified that he told his accountant on one occasion during the marriage that he wanted to change the ownership interests in POGO to reflect him as owning a 70% interest and Wife owning only a 30% interest, though he and Wife never followed through on any such amendment. In any event, assuming Husband provided all the initial capital for POGO, the documentation creates a presumption that Husband intended the contribution to be a gift.

¶ 33 We conclude that the evidence was not "clear, cogent, and convincing" to overcome the gift presumption as a matter of law. Indeed, the only evidence that Husband did *not* intend a gift was a few lines in Husband's self-serving testimony that he did not *subjectively* intend gifts to Wife when he allowed properties to be titled to POGO, an intent that he never shared with anyone prior to the separation.

¶ 34 We are aware of a case in which our Court held that testimony by a spouse concerning a lack of intent to make a gift when titling separate property to the marriage, without other evidence, is not necessarily insufficient to constitute clear, cogent, and convincing evidence to overcome the marital gift presumption. *Romulus v. Romulus*, 215 N.C. App.

495, 506, 715 S.E.2d 308, 316 (2011) ("Yet, arguably the only evidence which could potentially support findings of fact to rebut the marital presumption is plaintiff's testimony as to her intent. Herein lies the issue which the trial court must resolve on remand.") *Romulus*, however, is distinguishable from the present case. In *Romulus*, there was not much in evidence from which it could be determined *either way* whether a wife intended to gift a house to the marriage when she titled it to her and her spouse. Accordingly, in that case, we held that the wife's testimony alone might be enough to constitute evidence sufficient to rebut the marital presumption. *Id.* at 515-16, 715 S.E.2d at 322.

¶ 35 Here, though, there is substantial evidence *from Husband* through his words and actions that he *did intend* POGO and the three properties used to initially capitalize POGO to be joint assets, in addition his conversation with his accountant about changing his ownership interest from 50% to 70%. For instance, Husband testified that he wanted Wife to be involved in real estate investing and that the first property was originally titled to her only and was purchased to get her started. He testified that Wife was active in locating properties, that she participated in managing them, that she helped in negotiating for some of the purchases, and that she found a property and the tenant for one of the properties that they acquired through POGO. He testified that POGO was so named based on a combination of their last names and that their goal was to acquire ten properties through POGO so that their combined five children (from their respective prior marriages) would each one day have two rental properties apiece. Further, Husband participated with Wife in the acquisition of several POGO properties with the proceeds from loans guaranteed by both of them, never telling Wife that she was guaranteeing loans to buy property he considered to be his separate property.

¶ 36 In sum, all this evidence, overwhelmingly demonstrates that Husband and Wife jointly own POGO.

¶ 37 It may be that Husband thought that POGO would revert to him if the marriage ended in divorce. However, this belief would still indicate that he intended gifts, though perhaps *conditional* gifts. Indeed, such belief does not indicate a resulting trust, whereby he thought that Wife was merely holding her 50% interest in POGO in trust for him.

¶ 38 But the evidence is lacking to show even a gift, conditioned on the marriage not ending in divorce. Our Court has held as follows with *conditional* gifts generally:

> A person has the right to give away his or her property as he or she chooses and may limit a gift to a

> particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it. . . .
>
> The intention of the donor to condition the gift must be measured at the time the gift is made, as any undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expression and excludes all questions in regard to his unexpressed intention.

Courts v. Annie Penn, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866-67 (1993) (quotation marks omitted). The record here, though, does not disclose any evidence regarding Husband's words or actions that Wife's POGO interests would revert to him if the marriage ended in divorce.

¶ 39 **[3]** The Beach House-The beach house was never titled to POGO. Rather, Husband acquired this property in his own name with his own assets. He later re-titled it to both himself and Wife as tenants by the entirety. This act created a rebuttable presumption that he intended a gift of the beach house to the marriage. As with POGO, the trial court erroneously found that the gift presumption was overcome, in part, by the terms of the Agreement. But, regarding the beach house, the trial court also relied on a conversation that Husband and Wife had when he made the transfer to rebut the presumption. In this conversation, Wife indicated that she was afraid that Husband's ex-wife would kick her out of the beach house were he to die as the sole owner. The trial court found that Husband, therefore, re-titled the property to the marital estate *so that it would become Wife's if he were to die*. This conversation is *some* evidence as to what the parties, especially Husband, was thinking when the property was re-titled. This finding *could* alone support an ultimate finding that Husband intended only a resulting trust, that the property be held by the marital estate for his benefit, whereby Wife would only acquire any interest upon his death. We, therefore, vacate the portion of the order concerning the beach house and remand for further findings on this issue. On remand, the trial court must determine whether the conversation and other competent evidence in the record, apart from the Agreement, constitute "clear, cogent, and convincing" evidence to overcome the presumption that Husband gifted his beach house to himself and Wife jointly.

¶ 40 **[4]** Peru Assets-Wife challenges the trial court's order concerning interests in four Peruvian companies and several parcels of real estate in Peru.

¶ 41 She argues that the trial court erred by exercising jurisdiction over these Peruvian properties. We disagree. The trial court had *in personam* jurisdiction over the parties, as they were married in North Carolina, entered the Agreement in North Carolina, and subjected themselves to the jurisdiction of the court. And the trial court had subject matter jurisdiction to resolve the contract claim. Of course, whether Peru will honor a judgment from North Carolina concerning property located in Peru is not before us.

¶ 42 Alternatively, Wife argues that the trial court erred by declaring Husband the sole owner of these Peruvian assets. It is unclear from the findings in whose name(s) these properties are actually held in Peru or how they came to be so held. We vacate the portion of the order declaring that these properties are Husband's properties and remand for the trial court to make further findings with respect to these properties. The trial court, in its discretion, may hear additional evidence concerning these properties and consider legal arguments from the parties, including the effect of Peruvian property law, if any, on our marital gift presumption.

III. Conclusion

¶ 43 We reverse the trial court's order concerning POGO and the assets owned by POGO. We conclude that POGO is owned 50/50 by Husband and Wife.

¶ 44 We vacate and remand the trial court's order concerning the beach house. There is a presumption that Husband intended a gift of the beach house to the marriage when he executed a deed retitling the beach house to himself and Wife as tenants by the entirety. On remand, the trial court must determine whether there is "clear, cogent, and convincing" evidence in the record, apart from the terms of the Agreement, to overcome the gift presumption.

¶ 45 We vacate and remand the trial court's order concerning any Peruvian assets where the record owner is either Husband and Wife jointly or Wife solely. The trial court did not err in finding that Husband provided the only consideration to acquire these assets, as Wife does not challenge these findings. On remand, the trial court shall determine whether North Carolina or Peruvian law controls concerning the

ownership of said assets and apply the appropriate law to determine how these assets are to be distributed.

¶ 46 We conclude that the trial court erred in its award of attorneys' fees.

¶ 47 We affirm the trial court's order in all other respects.

AFFIRMED IN PART, REVERSED IN PART, VACATED AND REMANDED IN PART.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
DOMINIQUE JAWANN EDDINGS, DEFENDANT

No. COA20-758

Filed 2 November 2021

Search and Seizure—search warrant—probable cause—supporting affidavit—insufficient factual allegations

The trial court erred in a drug prosecution by denying defendant's motion to suppress evidence obtained from his house through a search warrant, where the affidavit in the warrant application did not allege sufficient facts to establish probable cause for the search. The affidavit alleged that police had previously observed a suspected drug dealer visiting defendant's house, followed the dealer's car after one of these visits, conducted a traffic stop, and found the dealer ingesting a white powdery substance; however, the affidavit did not state how long the dealer was inside the house, how much time had passed between when the dealer left the house and when law enforcement began following him, why law enforcement believed the dealer obtained his drug supply at defendant's house (as opposed to already having drugs in his possession before going there), or any other information linking defendant's house to illegal drug activity.

Chief Judge STROUD dissenting.

Appeal by Defendant from judgments entered 20 September 2019 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan R. Marx for the State.

W. Michael Spivey for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Dominique Jawann Eddings ("Defendant") appeals convictions of possession with intent to sell or deliver fentanyl, possession of fentanyl, possession of a firearm by a felon, and intentionally keeping or maintaining a building for keeping or selling a controlled substance. Prior to trial, Defendant moved to suppress evidence obtained during a search of his residence. The trial court denied the motion, finding probable cause. On appeal, Defendant challenges the denial of his motion to suppress; the denial of his motion to dismiss the charge of possession of a firearm by a felon; jury instructions given regarding the distinction between actual and constructive possession; and an alleged sentencing error. After careful review, we reverse the order denying Defendant's motion to suppress and grant Defendant a new trial.

I. Factual and Procedural Background

¶ 2 In 2018, the Buncombe County Sherriff's Office believed Robert Jones ("Jones") was selling narcotics in Leicester, North Carolina. Law enforcement had a confidential informant make a controlled purchase of narcotics from Jones at Jones's residence.

¶ 3 When the confidential informant successfully purchased fentanyl from Jones, law enforcement asked the informant to complete a second controlled purchase. Jones told the informant that "[h]e didn't have narcotics. He would have to go get narcotics." Law enforcement began surveilling Jones and observed Jones travel to a residence located at 92 Gillespie Drive. Jones remained at 92 Gillespie Drive for less than thirty minutes before meeting the informant at a nearby convenience store and providing narcotics to the informant. After observing this, law enforcement formed an opinion that Jones was procuring narcotics from 92 Gillespie Drive.

¶ 4 On April 19, 2018, Buncombe law enforcement officers arranged for the informant to purchase drugs from Jones for a third time. Prior to the scheduled controlled purchase, a surveillance team followed Jones as he traveled to 92 Gillespie Drive. Jones[1] remained at the residence

1. There is no evidence in the record that Jones lived at 92 Gillespie Drive.

for approximately ten minutes. Approximately two minutes after Jones left the residence, law enforcement attempted to perform a traffic stop. However, Jones did not stop his vehicle when law enforcement officers activated their emergency lights. While pursuing Jones, law enforcement officers "could see him eating something." Officers "finally got him stopped at [a] gas station" and noticed "that there was something in his beard that looked like white powder." It was determined later that Jones ingested narcotics.

¶ 5 Once law enforcement detained Jones, Detective Jason Sales ("Detective Sales") of the Buncombe County Sherriff's Office "wrote a search warrant" for the residence Jones had recently left. At the time, law enforcement did not know who resided at 92 Gillespie Drive, but Detective Sales "believe[ed] that [the house] [was] where [] Jones purchased his narcotics from, that this was, in fact, his source of supply." "[A] search warrant was drafted, approved by a supervisor, [and] taken to a magistrate."[2]

¶ 6 The search warrant application was comprised of six pages, and included: a broad description of items to be seized, including "any and all weapons," "any and all items of personal property," and any item that "could show information related to the manufacture, sale or distribution of controlled substances"; a list of three statutes law enforcement believed were violated; a description of the residence and directions from the Buncombe County Sheriff's Office to 92 Gillespie Drive; and an one-and-a-half page affidavit prepared by Detective Sales. The search warrant affidavit provided, in relevant parts,

> While surveilling Jones, BCAT Agents were also able to follow him to 92 Gillespie Drive . . . , also believed to be the Source of Supply for Jones. On this date . . . BCAT Agents were able to once again surveille Jones and follow him to the 92 Gillespie Drive address. With the help of the Buncombe County Sheriff's Community Enforcement Team (SCET), BCAT Agents were able to advise SCET when Jones would be leaving the residence of 92 Gillespie Drive and advised them the direction Jones would be traveling. . . . Jones was

2. A review of the transcript does not reveal that Detective Sales spoke with the magistrate. The transcript does not reveal who took the search warrant to the magistrate or if the officer who did so detailed law enforcement's surveillance of Jones to the issuing magistrate. Thus, we presume that the issuing magistrate only considered the search warrant affidavit in determining probable cause existed.

> placed under arrest and a subsequent search for suspected heroin/fentanyl was conducted. In the search of the vehicle Deputies were able to locate [drugs]. . . . Based on my training and experience, and the facts as set forth in this affidavit, I believe that in the residence of 92 Gillespie Drive, there exists evidence of a crime and contraband or fruits of that crime, to include the use and sale of illegal narcotics. With the information of the officers and confidential sources involved in this case, the affiant respectfully requests of the court that a search warrant be issued.

The search warrant was executed that same day.

¶ 7 At the time the search warrant was executed, several individuals — including Defendant's cousin, Defendant's fiancé, an infant, and a teenaged girl — appeared to be either living at or visiting the residence. The search revealed digital scales, fentanyl, inositol powder, and a safe containing money and documents belonging to Defendant. Officers recovered a handgun with a holster and magazine from Defendant's bedroom. Officers further recovered magazines and ammunition from various places inside the residence. The following day, Detective Sales obtained a second search warrant for the residence. During the second search, officers found a coffee can in the backyard containing packages of fentanyl.

¶ 8 Subsequently, on January 7, 2019, Defendant was indicted for possession with the intent to sell or deliver a Schedule II controlled substance, possession of fentanyl, possession of a firearm by a felon, and intentionally keeping or maintaining a dwelling for keeping or selling a controlled substance. On September 16, 2019, Defendant moved to suppress all evidence obtained during the searches of 92 Gillespie Drive, arguing the issuing magistrate "erred in finding probable cause to issue the search warrant to search Defendant's residence located at 92 Gillespie Drive." Defendant argued that the search warrant lacked sufficient probable cause and violated Defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution. Defendant's motion was denied. In its order denying Defendant's motion to suppress, the trial court made findings of fact which Defendant challenges. The relevant findings of fact are as follows:

> 2. The affidavit attached to the warrant is signed by Detective Jason B. Sales. In the affidavit he among other things asserts . . . [t]hat the task force with the

> aid of a confidential source of information recently purchased heroin/fentanyl from . . . Jones; [t]hat agents with task force were able to conduct surveillance of Mr. Jones on several occasions . . .; [t]hat during the surveillance they were also able to follow Mr. Jones to 92 Gillespie Drive, Leicester, NC, and based on their observations it was concluded that the source of supply of narcotics to Mr. Jones was coming from the property located at 92 Gillespie Drive . . .; [t]hat on April 19, 2018 the day of the application for the search warrant agents were again conducting surveillance on Mr. Jones and he again went to the property located at 92 Gillespie Drive; [t]hat immediately upon Mr. Jones leaving this property law enforcement followed Mr. Jones and based on other probable cause they quickly pulled Mr. Jones over and stopped him; [u]pon stopping Mr. Jones it was noted that he was ingesting a white powdery substance; . . . and [t]hat based on the training and experience of the detective he opined that there existed at the residence at 92 Gillespie Drive from which Mr. Jones had just left evidence of crime indicating the use and sale of illegal narcotics. This Court finds, as the magistrate did, the foregoing facts based on the affidavit attached to the search warrant.
>
> 5. . . . The affidavit supports a drug dealer frequenting the particular residence to be searched, and that the drug dealer was found with a substantial amount of drugs immediately upon leaving that residence. . . . The affidavit attached to the search warrant is sufficient to establish probable cause for the issuance of the warrant.
>
> 6. Based on the totality of the circumstances, the magistrate in this case had a substantial basis to conclude that probable cause existed to search . . . [D]efendant's home at 92 Gillespie Drive . . . .

¶ 9 Defendant's trial began on September 17, 2019, in the Buncombe County Superior Court. On September 20, 2019, a jury convicted Defendant on all counts: possession with intent to sell or deliver fentanyl, possession of fentanyl, possession of a firearm by a felon, and intentionally keeping or maintaining a dwelling for keeping or selling a

controlled substance. Judgments were entered upon the jury's verdicts. Defendant timely gave notice of appeal in open court.

¶ 10 On appeal, Defendant argues the trial court erred in denying his motion to suppress and his motion to dismiss the charge of possession of a firearm by a felon. Defendant further contends the trial court erred in failing to instruct the jury on constructive possession of a firearm and in sentencing Defendant as a Class I felon.

II. Discussion

¶ 11 Defendant first contends the trial court erred in denying his motion to suppress the evidence obtained through the search warrant, as the search warrant affidavit lacked probable cause for its issuance. After careful review, we agree and reverse the order denying Defendant's motion to suppress, as the application affidavit is fatally defective.

¶ 12 Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206, *disc. review denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

¶ 13 Pursuant to N.C. Gen. Stat. § 15A-244, an application for a search warrant must contain a statement of probable cause and "[a]llegations of fact supporting the statement [of probable cause]. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause . . . ." N.C. Gen. Stat. § 15A-244(2)-(3) (2020); *see also State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015). The supporting affidavit "is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 132, 191 S.E.2d 752, 757 (1972) (quoting *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971)). "Probable cause 'does not mean actual and positive cause,' nor does it import absolute certainty." *Id.* at 129, 191 S.E.2d at 755 (quoting 47 Am. Jur., Searches and Seizures, § 22). We review whether the issuing magistrate had "a 'substantial basis for . . . conclud[ing]' that probable cause existed." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citation omitted).

¶ 14 Whether the search warrant "affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the Fourth Amendment." *Campbell*, 282 N.C. at 129, 191 S.E.2d at 756 (citing *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948)). The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV, XIV; *see also State v. McKinney*, 361 N.C. 53, 57-58, 637 S.E.2d 868, 871-72 (2006) (citations omitted); *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citations omitted). Under the Fourth Amendment, a search warrant may be issued only "upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *see also State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302-03 (2016); N.C. Const. art. I, § 20. The issuing magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)) (quotation marks omitted). A magistrate may make such determination upon "the totality of the circumstances," drawing "reasonable inferences" from the facts in an affidavit to support a finding of probable cause. *Id.*; *see also State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991).

¶ 15 Factors "taken into account in the probable cause determination" include "[t]he experience and the expertise of the affiant officer . . . so long as the officer can justify his belief to an objective third party." *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 462 (1988) (citation omitted). "The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances" to support the affiant's belief that probable cause existed. *Campbell*, 282 N.C. at 129, 191 S.E.2d at 755. The issuing magistrate may not rely on an affiant's mere belief that probable cause existed, as such "purely conclusory" affidavits are inappropriate to further the impartial objective of the magistrate. *Id.* at 131, 191 S.E.2d at 756 (citation omitted).

¶ 16 An affidavit "must establish a nexus between the objects sought and the place to be search[ed]." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citation omitted). "The existence . . . of a nexus is subject to the same totality of the circumstances inquiry as any other

evidence establishing probable cause." *State v. Lovett*, No. COA20-539, 2021-NCCOA-171, 2021 WL 1541478, at ¶ 25 (N.C. Ct. App. April 20, 2021) (unpublished) (citing *McCoy*, 100 N.C. App. at 577-78, 397 S.E.2d at 357-58). Probable cause to search one location can be obtained from evidence at another location; however, such evidence must "implicate the premises to be searched." *State v. Washburn*, 201 N.C. App. 93, 101, 685 S.E.2d 555, 561 (2009) (quoting *State v. Goforth*, 65 N.C. App. 302, 308, 309 S.E.2d 488, 493 (1983)).

¶ 17 In determining "whether the search warrant affidavit at issue established probable cause," we are guided by our Supreme Court's decision in *State v. Lewis*, 372 N.C. 576, 831 S.E.2d 37 (2019). In *Lewis*, the affidavit requested a search of a residence where a robber was arrested. *Id.* at 588, 831 S.E.2d at 45. However, the affidavit failed to properly implicate the residence when it did not detail the circumstances explaining law enforcement's presence at the residence; did not include a conversation between a deputy and the defendant's family member that would have revealed to the magistrate that the defendant lived at the residence; and did not mention that the defendant's car was seen at the front of the house. *Id.* Though the affidavit listed a thorough account of the defendant's incriminating behavior and law enforcement's activities in apprehending him, the affidavit was found to be fatally defective. *Id.* at 588, 831 S.E.2d at 45-46. In holding the defendant's motion to suppress should have been allowed, our Supreme Court reasoned the

> [d]efendant could have been present at [the residence] at the time of his arrest for any number of reasons. Absent additional information linking him to the residence or connecting the house with criminal activity, no basis existed for the magistrate to infer that evidence of the robberies would likely be found inside the home.

Id. at 588, 831 S.E.2d at 45-46.

¶ 18 In the present appeal, no evidence was presented at the suppression hearing[3] and the trial court's order states it made its findings of fact "after review of the Court file and after review of the contested search warrant." Moreover, "a trial court may not consider facts 'beyond the four corners' of a search warrant in determining whether a search warrant was supported by probable cause at a suppression hearing." *State v. Logan*,

3. "[I]t is axiomatic that arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

278 N.C. App. 319, 2021-NCCOA-311, ¶ 27 (quoting *State v. Benters*, 367 N.C. 660, 673-74, 766 S.E.2d 593, 603 (2014)). The search warrant affidavit is the only document contained in the record on appeal containing allegations of fact to support a statement of probable cause. The trial court found that law enforcement officers "immediately" followed Jones from the residence and "quickly pulled . . . Jones over and stopped him." The affidavit attached to the search warrant does not reveal how much time passed once Jones left Defendant's residence and the time Jones was apprehended with narcotics during a traffic stop. In fact, the affidavit is devoid of any facts regarding when or how Jones obtained narcotics or whether he had narcotics in his possession prior to traveling to Defendant's residence. The affidavit merely states "Buncombe County Anti-Crime Taskforce Agents were able to advise SCET when Jones would be leaving the residence . . . and advised them the direction Jones would be traveling." It is not clear whether SCET members observed Jones leave 92 Gillespie Drive, nor how much time passed between when Jones left the residence and when law enforcement officers began following his vehicle. The remaining pages of the search warrant application do not detail why law enforcement believed the enumerated statutes were violated or why law enforcement believed 92 Gillespie Drive was Jones's source of supply. Therefore, we hold that the trial court's finding that law enforcement officers "immediately" followed Jones is unsupported.

¶ 19 Likewise, the trial court's finding that "the drug dealer was found with a substantial amount of drugs immediately upon leaving that residence," is not supported by the four corners of the affidavit. Although the affidavit states law enforcement officers stopped Jones and observed him "attempting to ingest an unknown substance," the affidavit does not provide any details as to how long law enforcement officers followed Jones, nor how long it took SCET officers to locate Jones's vehicle after BCAT agents informed SCET of the direction of travel. "Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982).

¶ 20 Detective Sales believed the residence "to be the Source of Supply for Jones," but he did not provide the factual reason for his belief in the affidavit. While law enforcement officers observed Jones at the property at least twice before, the affidavit does not detail how long Jones was inside the residence. Although the affidavit revealed a confidential informant purchased narcotics from Jones "in recent days" and that Jones

was later observed at 92 Gillespie Drive, it is not clear how much time passed between the controlled purchase and when Jones was observed at Defendant's residence. The affidavit is devoid of facts detailing the confidential informant's conversation with Jones in which Jones stated he would need to obtain narcotics for the third controlled purchase. Thus, the trial court's finding that "[t]he residence to be searched is thereby linked to the drug activity" remains uncorroborated.

¶ 21 The trial court included the following as a conclusion of law: "[t]he affidavit attached to the search warrant is sufficient to establish probable cause for the issuance of the warrant." While Detective Sales's expertise and belief that 92 Gillespie Drive was Jones's source of supply bears weight, the affidavit application must state facts sufficient to support a finding probable cause existed. *See Barnhardt*, 92 N.C. App. at 98, 373 S.E.2d at 462; *see also Campbell*, 282 N.C. at 131, 191 S.E.2d at 756. As the trial court noted, all that can be discerned from the plain language of the affidavit is that law enforcement observed Jones at 92 Gillespie Drive and apprehended Jones with narcotics "on the same date." Notwithstanding the fact that Jones had visited the residence at least twice before, the record before this Court tends to show that Detective Sales did not provide any facts or circumstances that would lead an objective magistrate to reasonably conclude that drugs or other illegal items could potentially be found at 92 Gillespie Drive. Jones "could have been present at [the residence] . . . for any number of reasons." *Lewis*, 372 N.C. at 588, 831 S.E.2d at 45-46. Probable cause cannot be shown by affidavits which are purely conclusory without detailing any of the underlying circumstances upon which the conclusion is based. Thus, we hold the affidavit, as stated in this case, does not provide sufficient facts and circumstances to supply a magistrate with a substantial basis to infer probable cause. Because we conclude the trial court erred in denying Defendant's motion to suppress, we do not need to address his remaining arguments on appeal.

III. Conclusion

¶ 22 After careful review, we hold the search warrant affidavit did not provide a sufficient basis for a finding of probable cause to search Defendant's residence. We reverse the order denying Defendant's motion to suppress and grant Defendant a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

Judge COLLINS concurs.

Chief Judge STROUD dissents by separate opinion.

STROUD, Chief Judge, dissenting.

¶ 23 Because I conclude the search warrant affidavit provides a sufficient basis for probable cause to search defendant's residence, I would affirm the order denying defendant's motion to suppress; therefore, I dissent.

¶ 24 I agree with the majority that the question before us is whether there was probable cause for the issuance of the search warrant.

> With regard to a search warrant directed at a residence, probable cause means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

State v. Bailey, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020) (citation and quotation marks omitted). *Bailey* further explains,

> This standard for determining probable cause is flexible, permitting the magistrate to draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant. That evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience. Probable cause requires not certainty, but only *a probability or substantial chance of criminal activity*. The magistrate's determination of probable cause is given great deference and after-the-fact scrutiny should not take the form of a *de novo* review.

Id. (emphasis in original) (citation, quotation marks, and ellipses omitted).

¶ 25 Here, the search warrant application included six pages of attachments detailing what was to be seized, the crimes Detective Sales believed were taking place, a specific description of the location to be searched which included a picture of a map with street names, and Detective Sales's affidavit. The affidavit stated in part:

> The applicant swears or affirms to the following facts to establish probable cause for the issuance of a search warrant

I, the affiant Jason B. Sales, am a sworn law enforcement officer with the Buncombe County Sheriff's Office. I am an Agent assigned to the Buncombe County Anti-Crime Task Force Division, tasked with investigating violations of criminal law and narcotic investigations. I have been a sworn Deputy for 16 years. I am currently a member of the Sheriff's Special Response Team (SRT) and a member of the Buncombe County Sheriff's Office Crisis Intervention Team (CIT). Prior assignments with this agency have included duties within the Special Investigations Division (Sexual Related Crimes), Property Crimes Division, Patrol Division, Court Security Division, Transportation Division, and in the Detention Center. I have had over 1,800 hours training in Law Enforcement related courses. I have had training in investigative processes, legal updates, execution of search warrants, resolution of barricaded suspects, and currently certified through LELA for Clandestine Labs related to, but not limited to Methamphetamine, LSD, MDMA, and Fentanyl. I hold a vocational diploma in Criminal Justice with AB-Tech.

The information set forth in this affidavit is the result of my own investigation or has been communicated to me by others involved in this investigation.

In recent days the Buncombe County Anti-Crime Taskforce (BCAT) with the aid of a confidential source of information (CSI) have purchased an amount of heroin/fentanyl from Robert Mitchell Jones (12/31/1959).

With information received from the CSI, BCAT Agents were able to surveille Jones on several occasions and observe him make what were believed to be narcotics transactions in the Leicester Community of Buncombe County. While surveilling Jones, BCAT Agents were also able to follow him to 92 Gillespie Drive, Leicester NC 28748, also believed to be the Source of Supply for Jones.

On this date, Thursday, April 19, 2018 BCAT Agents were able to once again surveille Jones and follow him

> to the 92 Gillespie Drive address. With the help of the Buncombe County Sheriff's Community Enforcement Team (SCET), BCAT Agents were able to advise SCET when Jones would be leaving the residence of 92 Gillespie Drive and advised them the direction Jones would be traveling. With the SCET team in place, BCAT Agents observed Jones leave 92 Gillespie Drive and turn right onto New Leicester Hwy. BCAT Agent informed SCET the direction of travel and the type of vehicle Jones was operating (Maroon/Red Nissan extra cab 2wd pick-up). SCET was able to locate the vehicle and form their own basis for probable cause to effect a vehicle stop for Jones. SCET was able to determine their own probable cause for the stop and initiate said stop. Once the blue lights were activated, Jones was observed attempting to ingest an unknown white powdery substance. The traffic stop was conducted in the parking lot area of 3148 New Leicester Hwy, BP Service Station. At the traffic stop Jones exited his vehicle and [was] approached by Deputies. Deputies observed a plastic baggie sticking out of Jones['s] rear pocket and was motioning to the baggie. Deputies went to retrieve the baggie and some of the white powdery substance went airborne into the Deputies['s] face. Jones was placed under arrest and a subsequent search for suspected heroin/fentanyl was conducted. In the search of the vehicle Deputies were able to locate three (3) individual wrapped foil packs containing approx. two (2) grams of suspected heroin/fentanyl each inside the vehicle. EMS was called to the traffic stop and were able to observe Jones and the Deputy exposed to the suspected heroin/fentanyl.
>
> Based on my training and experience, and the facts as set forth in this affidavit, I believe that in the residence of 92 Gillespie Drive, there exists evidence of a crime and contraband or fruits of that crime, to include the use and sale of illegal narcotics. With the information of the officers and confidential sources involved in this case, the affiant respectfully requests of the court that a search warrant be issued.

According to the majority opinion, the main deficiency in the affidavit appears to be the passage of time both (1) in the prior days when law

enforcement had observed what they believed to be illegal drug transactions and (2) from the time Jones left defendant's house until he was stopped and apprehended with narcotics.

¶ 26 The affidavit notes that the prior purchases from Jones were made "[i]n recent days[,]" and it is sufficiently specific enough to note the transactions as "recent[.]" I am not aware of any case law requiring search warrants to provide more specific details than noting "in recent days[,]" particularly when as here, there are many other specific details in the affidavit to test its veracity. *See generally State v. Ellington*, 18 N.C. App. 273, 196 S.E.2d 629, *aff'd*, 284 N.C. 198, 200 S.E.2d 177 (1973) (determining that an affidavit provided reasonable cause to search luggage where it noted information had been obtained "recently"). In later interpreting *Ellington*, this Court stated in *State v. Brown*,

> In *State v. Ellington*, 284 N.C. 198, 200 S.E.2d 177 (filed 14 November 1973), the Supreme Court refused to hold that the following language in an affidavit was insufficient under *Aguilar v. Texas*, *supra*, to establish the reliability of a confidential informant:
>
> > "Deputy Simmons advises that his informer is 100% reliable, and that information obtained from this same informant recently led to the confiscation of 120,000 Barbituates recently in New York City."
>
> The obvious distinction between the affidavit in *Ellington*, *supra*, and the affidavit before us is that the former refers—although generally—to a specific instance of information whereas the latter refers only to a general pattern of information. Nevertheless, we hold that this affidavit is sufficient under *Aguilar v. Texas*, *supra*, and *State v. Ellington*, *supra*.
>
> > "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. *If the teaching of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical*

> *requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before* acting." *State v. Ellington*, *supra*, at 204, 200 S.E.2d at 181 [quoting *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)].

State v. Brown, 20 N.C. App. 413, 415, 201 S.E.2d 527, 529 (1974) (emphasis added).

¶ 27 As to the timing of when Jones was stopped, a plain reading of the affidavit indicates Jones was stopped very quickly after driving away from defendant's home. In denying the motion to suppress, the trial court fairly summarized the affidavit in finding "[t]hat immediately upon Mr. Jones leaving this property law enforcement followed Mr. Jones and based on other probable cause they *quickly* pulled Mr. Jones over and stopped him[.]" (Emphasis added). The majority's own summary of the facts indicates that it was approximately two minutes from when Jones left defendant's residence until law enforcement attempted to stop him.

¶ 28 Further, the affidavit notes that law enforcement was in place already aware of "the direction Jones would be traveling" so that they could quickly stop him, and Jones had only made one right turn before the stop. While the local magistrate was likely aware of the proximity of the locales mentioned in the affidavit, I take judicial notice that defendant's house is 2.8 miles from the address where Jones was stopped, and thus assuming normal driving speeds, the time to travel the distance would be at most a few minutes. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . A court may take judicial notice, whether requested or not."); *see generally State v. Brown*, 221 N.C. App. 383, 387, 732 S.E.2d 584, 587 (2012) (taking "judicial notice of the driving distance between White's residence and defendant's girlfriend's apartment as being in excess of 27 miles. In *State v. Saunders*, 245 N.C. 338, 342, 95 S.E.2d 876, 879 (1957), our Supreme Court held that it was appropriate for the trial

court to take judicial notice of the distance in miles between cities in Virginia and North Carolina."). I believe the trial court's characterization of the stop as "immediat[e]" was accurate given "a commonsense and realistic" interpretation rather than the "[t]echnical [interpretation of the] requirements [with] elaborate specificity" which is discouraged. *Brown*, 20 N.C. App. at 415, 201 S.E.2d at 529.

¶ 29 A "commonsense" reading of the search warrant affidavit, *Bailey*, 374 N.C. at 335, 841 S.E.2d at 280, indicates that due to his extensive training and experience as a law enforcement officer Detective Sales was familiar with the circumstances generally surrounding illegal drug sales; via a confidential informant Detective Sales was aware Jones had recently been dealing in illegal drugs; other law enforcement officers surveilled Jones "on several occasions" conducting what they believed were narcotic transactions, including at defendant's home; law enforcement observed Jones enter defendant's home; immediately after leaving defendant's home, law enforcement officers, based on other established probable cause attempted to stop Jones and saw him ingesting a white substance; a search of Jones's vehicle revealed many illegal drugs. The affidavit establishes, "a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *Id.*

¶ 30 Accordingly, I would affirm the trial court's order determining there was probable cause for issuance of the search warrant. Thus, I dissent.

STATE v. GARRETT

[280 N.C. App. 220, 2021-NCCOA-591]

STATE OF NORTH CAROLINA
v.
HALO GARRETT, DEFENDANT

No. COA19-1171

Filed 2 November 2021

Constitutional Law—juvenile tried as adult—prior to change in law—new law not retroactive—no flagrant violation of rights

Defendant was not entitled to dismissal of criminal charges under N.C.G.S. § 15A-954(a)(4) where he was prosecuted as an adult for acts committed when he was sixteen years old but a subsequently-enacted law—applied prospectively—raised the age at which offenders could be automatically tried as adults. Defendant could not show that his constitutional rights were violated, much less flagrantly violated, because the statute changes did not create a classification between different groups of people to trigger an equal protection violation, his prosecution as an adult did not criminalize a status which could implicate the Eighth Amendment prohibition against cruel and unusual punishment, and neither his substantive nor procedural due process rights were violated where being tried as a juvenile did not involve a protected interest and the State had a rational basis for updating statutes based on evolving standards of fairness.

Appeal by the State from order entered 19 September 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellee.

MURPHY, Judge.

¶ 1 On a motion to dismiss pursuant to N.C.G.S. § 15A-954(a)(4), a defendant bears the burden of showing his constitutional rights were flagrantly violated, causing irreparable prejudice to the preparation of his case that can only be remedied by dismissal of the prosecution. Here, Defendant cannot show that he experienced any flagrant violation of

his constitutional rights, and as such he was not irreparably prejudiced. We reverse the trial court's order dismissing Defendant's charges and remand to the trial court.

BACKGROUND

¶ 2 Defendant Halo Garrett was born on 24 September 1999. On 13 December 2015, Defendant, at sixteen years old, allegedly broke into a home and stole several items.

¶ 3 On 24 October 2016, Defendant was charged in Mecklenburg County Superior Court as an adult pursuant to the then effective version of N.C.G.S. § 7B-1604(a) with felonious breaking or entering and larceny after breaking or entering, both Class H felonies. *See* N.C.G.S. § 7B-1604(a) (2015) ("Any juvenile, including a juvenile who is under the jurisdiction of the court, who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). In 2017, after Defendant was charged, the General Assembly passed the Juvenile Justice Reinvestment Act, which changed how and when a juvenile could be prosecuted as an adult in Superior Court.[1] *See* 2017 S.L. 57 § 16D.4(c)-(e). The Juvenile Justice Reinvestment Act became effective on 1 December 2019 and does not apply retroactively. *See* 2017 S.L. 57 § 16D.4(tt). Had Defendant's offense date for the same Class H felonies occurred after 1 December 2019, Defendant would have initially been within the jurisdiction of the Juvenile Court[2] and an assessment would have been made to determine if he should be sentenced as an

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1. Most relevant to the facts of this case, the Juvenile Justice Reinvestment Act changed how sixteen-year-old and seventeen-year-old juveniles charged with Class H and Class I felonies could be prosecuted. *Compare* N.C.G.S. § 7B-1604(a) (2015), *with* N.C.G.S. § 7B-2200.5(b) (2019). Prior to the enactment of the Juvenile Justice Reinvestment Act, any juvenile who was sixteen or older when committing an alleged criminal offense was automatically prosecuted as an adult. *See* N.C.G.S. § 7B-1604(a) (2015) ("Any juvenile, including a juvenile who is under the jurisdiction of the court, who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). After the enactment of the Juvenile Justice Reinvestment Act, the same juveniles are under the jurisdiction of Juvenile Court, and an assessment must be made prior to transferring jurisdiction to Superior Court. *See* N.C.G.S. § 7B-2200.5(b) (2019) ("If the juvenile was 16 years of age or older at the time the juvenile allegedly committed an offense that would be a Class H or I felony if committed by an adult, after notice, hearing, and a finding of probable cause, the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to [S]uperior [C]ourt pursuant to [N.C.G.S. §] 7B-2203."). N.C.G.S. § 7B-2203(b) includes eight factors for the Juvenile Court to consider in determining "whether the protection of the public and the needs of the juvenile will be served by transfer of the case to [S]uperior [C]ourt[.]" *See* N.C.G.S. § 7B-2203(b) (2019).

2. For ease of reading, we refer to the District Court as "Juvenile Court."

adult in Superior Court. *See* N.C.G.S. §§ 7B-2200.5(b); 7B-2203 (2019). Pursuant to the law at the time of his alleged offense in 2015, Defendant must be tried and potentially sentenced as an adult in Superior Court. *See* N.C.G.S. § 7B-1604(a) (2015).

¶ 4 The case was set for trial in late 2017, but Defendant failed to appear for trial on that date. Due to Defendant's failure to appear, he was arrested in 2019 and his case proceeded towards trial. At a pretrial hearing, Defendant was heard on a *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4), alleging flagrant violations of his constitutional rights to equal protection, due process, and protection from cruel and unusual punishment under the United States Constitution and the North Carolina Constitution as a result of being prosecuted as an adult in Superior Court.

¶ 5 After analyzing the constitutionality of Defendant's prosecution as an adult for crimes he allegedly committed while sixteen years old, the trial court granted Defendant's *Motion to Dismiss* and memorialized its ruling in its *Order Granting Defendant's Motion to Dismiss* ("Order"). The Order included the following "findings of fact":

> 1. Halo Garrett, hereinafter Defendant, is charged with Breaking and/or Entering and Larceny after Breaking and/or Entering in 15CRS245691 and 15CRS245692.
>
> 2. Breaking and/or Entering is a class H felony and Larceny after Breaking and/or Entering is a class H felony.
>
> 3. The State alleges that on [13 December 2015], Defendant broke into the apartment of [the alleged victim] and stole items from within.
>
> 4. Defendant was born on [24 September 1999] and was sixteen at the time of this alleged offense.
>
> 5. Defendant's cases were originally scheduled for trial during the fall of 2017, but Defendant failed to appear for calendar call. The State called the case for trial on [14 August 2019], after Defendant had been arrested on the Order for Arrest from the missed court date.
>
> 6. North Carolina is currently the last state in the country to automatically prosecute sixteen- and seventeen- year-olds as adults.

7. In 2017, the Juvenile Justice Reinvestment Act passed with bipartisan support. In N.C.G.S. [§] 7B-1601, The Juvenile Justice Reinvestment Act increased the age of [J]uvenile [C]ourt jurisdiction to eighteen effective [1 December 2019]. For class H and I felonies committed by sixteen-year-olds, the court must affirmatively find after hearing that "the protection of the public and the needs of the juvenile will be served by transfer to [S]uperior [C]ourt;" otherwise the [J]uvenile [C]ourt retains exclusive jurisdiction.

8. Despite Defendant's age at the time of the alleged offense, he is not eligible for [J]uvenile [C]ourt under N.C.G.S. [§] 7B-1601 because the law does not go into effect until [1 December 2019].

9. In juvenile transfer hearings, the court must consider eight factors in determining whether a case should remain in [J]uvenile [C]ourt or be transferred to adult court. Those eight factors are the age of the juvenile, the maturity of the juvenile, the intellectual functioning of the juvenile, the prior record of the juvenile, prior attempts to rehabilitate the juvenile, facilities or programs available to the court prior to the expiration of the court's jurisdiction and the potential benefit to the juvenile of treatment or rehabilitation, the manner in which the offense was committed, and the seriousness of the offense and protection of the public.

10. In a 2015 report issued by the North Carolina Commission on the Administration of Law, the Commission compared adult and juvenile criminal proceedings. Juveniles prosecuted in adult court face detention in jail and the heightened risk of sexual violence posed to youthful inmates, no requirement of parental notice or involvement, active time in adult prison, risk of physical violence, public records of arrest, prosecution and conviction, and collateral consequences imposed by a conviction. Juvenile [C]ourt, on the other hand, requires an evaluation of a complaint that includes interviews with juveniles and parents, mandatory parental involvement, individualized consequences, treatment, training and

rehabilitation, monthly progress meetings, and a confidential record of delinquency proceedings.

11. Defendant alleged that his constitutional rights have been flagrantly violated and that there is such irreparable prejudice to Defendant's preparation of his case that there is no remedy but to dismiss the prosecution under N.C.G.S. [§] 15A-954(a)(4).

12. Defendant alleged three grounds under which his constitutional rights have been violated. Each ground would be sufficient for dismissal under N.C.G.S. [§] 15A-954(a)(4). The three grounds are cruel and unusual punishment under the [Eighth] Amendment, violation of Defendant's due process rights, and a violation of Defendant's equal protection rights. Defendant asserted his rights under the corresponding provisions of the North Carolina Constitution as stated in his Motion.

13. Defendant alleged that his [Eighth] Amendment rights have been violated in that his prosecution in adult court for an offense allegedly committed when he was sixteen constitutes cruel and unusual punishment.

14. The [Eighth] Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.

15. The [United States] Supreme Court has addressed the treatment of juveniles in the criminal justice system in a recent line of cases.

16. In its analysis in this line of cases, the Court looked to the consensus of legislative action in states around the country because consistency in the direction of change is powerful evidence of evolving standards of decency.

17. Every state in the country to have addressed the age of juvenile prosecution has raised the age, not lowered it or left it the same.

18. The Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005) that American society views

juveniles as categorically less culpable than adult offenders due to their lack of maturity and underdeveloped sense of responsibility, vulnerability to negative influences and outside pressures, and malleable character.

19. In *Roper*, the Court held that in regard to juveniles, the death penalty did not serve its intended aims of deterrence or retribution.

20. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that juveniles convicted of non-homicidal offenses should not be sentenced to life without parole.

21. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that sentencing juvenile defendants to mandatory life in prison without parole violated the [Eighth] Amendment.

22. In *Montgomery v. Louisiana*, 577 U.S. ___ (2016), the Supreme Court held that *Miller* applied retroactively to defendants sentenced to life without parole prior to 2012 and that hearings could be conducted in these cases to consider eligibility for parole status.

23. The [caselaw] discussed in the Report and in the cases cited heavily on scientific research. The scientific research indicates that the development of neurobiological systems in the adolescent brain cause teens to engage in greater risk-taking behavior; that teenage brains are not mature enough to adequately govern self-regulation and impulse control; that teens are more susceptible to peer influence than adults; that teens have a lesser capacity to assess long-term consequences; that as teens mature, they become more able to think to the future; and that teens are less responsive to the threat of criminal sanctions.

24. Defendant alleges that his due process rights have been violated in that he has been automatically prosecuted in adult criminal court without a hearing and findings in support of transfer.

25. As of [1 December 2019], North Carolina will no longer permit a sixteen-year-old charged with class

H felonies to be automatically prosecuted, tried and sentenced as an adult.

26. In *Kent v. United States*, 383 U.S. 541 (1966), the Supreme Court held that the process of transferring a juvenile to adult court is one with such tremendous consequences that it should require attendant ceremony such as a hearing, assistance of counsel, and a statement of reasons.

27. Defendant alleges that his right to equal protection under the Constitution has been violated.

28. The Equal Protection clause of the Constitution protects against disparity in treatment by a State between classes of individuals with largely indistinguishable circumstances.

29. Legislation is presumed valid and will be sustained if classification is rationally related to a legitimate state interest.

30. A criminal statute is invalid under the NC Constitution if it provides different punishment for the same acts committed under the same circumstances by persons in like situations.

31. There is no rational basis for distinguishing between automatic prosecution and punishment of Defendant in adult court now and punishment of a sixteen-year-old after [1 December 2019].

32. Each of the constitutional violations raised by Defendant and found by the [trial court] have caused irreparable prejudice to Defendant in that the State has denied Defendant the age-appropriate procedures of [J]uvenile [C]ourt and, correspondingly, exposed him to the more punitive direct and collateral consequences of adult court.

¶ 6 The Order included the following "conclusions of law":

1. The holding in *State v. Wilkerson*, [232 N.C. App. 482, 753 S.E.2d 829] (2014), is not controlling and the underlying rationale is not applicable to the case at bar.

> 2. That Defendant is not covered by the [Juvenile Justice Reinvestment Act] in North Carolina; however, based upon the same reasoning that went into the [Juvenile Justice Reinvestment Act], "evolving standards of decency," and the reasoning contained in the cases cited by [] Defendant, that his prosecution in adult court violates his rights.
>
> 3. By his being prosecuted as an adult in this case, Defendant's [Eighth] Amendment right against cruel and unusual punishment is being violated.
>
> 4. By his being prosecuted as an adult in this case, Defendant's right to due process is being violated.
>
> 5. By his being prosecuted as an adult in this case, Defendant's right to equal protection under the laws is being violated.
>
> 6. Once an equal protection violation has been established, the burden shifts to the State to demonstrate an inability to remedy the violation in a timely fashion.
>
> 7. The State did not meet its burden in this case.
>
> 8. As a result of the continuing attempts to prosecute [] Defendant as an adult in these cases, Defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to [] Defendant's preparation of his case that there is no remedy but to dismiss the prosecution pursuant to N.C.G.S. [§] 15A-954.
>
> 9. Defendant is being deprived of his right to be treated as a juvenile, which he was at the time he allegedly committed these crimes, with all of the attendant benefits granted to juveniles to reform their lives.
>
> 10. That Assistant District Attorney, on behalf of the State, has had an opportunity to review these FINDINGS OF FACT[], CONCLUSIONS OF LAW AND ORDER.

¶ 7 In the Order, the trial court concluded Defendant's constitutional rights to equal protection, protection from cruel and unusual punishment, and due process were violated by the prosecution of Defendant as an

adult. The trial court went on to conclude the loss of the benefits of Juvenile Court irreparably prejudiced the preparation of his case such that dismissal was the only remedy. The State timely appealed in accordance with N.C.G.S. § 15A-1445(a)(1). *See* N.C.G.S. § 15A-1445(a)(1) (2019) (permitting the State to appeal from the Superior Court to the appellate division when "there has been a decision or judgment dismissing criminal charges as to one or more counts").

ANALYSIS

¶ 8 On appeal, the State challenges the trial court's grant of Defendant's *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4), contending there were no flagrant violations of Defendant's constitutional rights and no irreparable prejudice to the preparation of his case requiring dismissal. The State challenges Findings of Fact 14-31 and Conclusions of Law 3-9. Some of these challenged findings of fact may be erroneous, or more properly characterized as conclusions of law. However, for the purposes of our analysis we assume, without deciding, that all findings of fact properly characterized as such were supported by competent evidence. Additionally, we treat any findings of fact that are more properly characterized as conclusions of law as such, rather than as binding findings of fact. *See State v. Campola*, 258 N.C. App. 292, 298, 812 S.E.2d 681, 687 (2018) ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*.").[3] We reverse the Order as Defendant's constitutional rights were not violated, let alone flagrantly violated.

¶ 9 Defendant's *Motion to Dismiss* was made pursuant to N.C.G.S. § 15A-954(a)(4), which reads:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . . .
>
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

3. While other findings of fact in the Order may be properly characterized as conclusions of law, we specifically note that Finding of Fact 31 is more properly characterized as a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted) (holding "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law").

N.C.G.S. § 15A-954(a)(4) (2019). "As the movant, [D]efendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision 'contemplates drastic relief,' such that 'a motion to dismiss under its terms should be granted sparingly.' " *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (quoting *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978)).

¶ 10 In reviewing motions to dismiss made pursuant to N.C.G.S. § 15A-954(a)(4), our Supreme Court has applied the following relevant principles:

> The decision that [a] defendant has met the statutory requirements of N.C.G.S. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Williams, 362 N.C. at 632-33, 669 S.E.2d at 294 (marks and citations omitted).

¶ 11 In terms of flagrant constitutional violations, the trial court concluded:

> 3. By his being prosecuted as an adult in this case, Defendant's [Eighth] Amendment right against cruel and unusual punishment is being violated.
>
> 4. By his being prosecuted as an adult in this case, Defendant's right to due process is being violated.
>
> 5. By his being prosecuted as an adult in this case, Defendant's right to equal protection under the laws is being violated.

The trial court specifically found that "[e]ach of the constitutional violations raised by Defendant and found by the [trial court] have caused irreparable prejudice to Defendant in that the State has denied Defendant the age-appropriate procedures of [J]uvenile [C]ourt and, correspondingly, exposed him to the more punitive direct and collateral consequences of adult court." As a result, each of the constitutional violations independently supported the trial court's ruling, and each constitutional violation must be addressed.

A. Equal Protection

¶ 12 Here, the trial court found an equal protection violation based on the lack of a rational basis for treating sixteen-year-old juveniles differently depending on the date of the alleged Class H felony. Sixteen-year-old juveniles alleged to have committed a Class H felony before the effective date of the Juvenile Justice Reinvestment Act, like Defendant, are automatically prosecuted as adults in Superior Court; whereas, sixteen-year-old juveniles alleged to have committed a Class H felony after the effective date of the Juvenile Justice Reinvestment Act are initially prosecuted in Juvenile Court, and then a determination is made as to whether the juvenile should be prosecuted as an adult in Superior Court.

¶ 13 "[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505, 55 L. Ed. 561, 563 (1911).

¶ 14 The basis of the alleged equal protection violation here is unpersuasive. In *State v. Howren*, our Supreme Court addressed a claimed equal protection violation based on "the fact that after 1 January 1985 an individual charged with driving while impaired must [have been] given two chemical breath analyses[,]" whereas at the time of the appeal "only one analysis [was] required, and [the] defendant was only given one breathalyzer test." *State v. Howren*, 312 N.C. 454, 457, 323 S.E.2d 335, 337 (1984). Our Supreme Court held:

> A statute is not subject to the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment of the United States Constitution or [A]rticle I § 19 of the North Carolina Constitution unless it creates a classification between different groups of people. In this case no classification between different groups has been created. All individuals charged with driving while impaired before 1 January 1985 will be treated in exactly the same way as will all individuals charged after 1 January 1985. The statute merely treats the same group of people in different ways at different times. It is applied uniformly to all members of the public and does not discriminate against any group. If [the] defendant's argument were accepted the State would never be able to create new safeguards against error in criminal prosecutions without invalidating

> prosecutions conducted under prior less protective laws. Article I § 19 and the [E]qual [P]rotection [C]lause do not require such an absurd result.

Id. at 457-58, 323 S.E.2d at 337-38.

¶ 15 Defendant's claimed equal protection violation here is based on the same principle as the claimed equal protection violation our Supreme Court rejected in *Howren*—that treating the same group of people differently at different times constitutes an equal protection violation. Defendant's equal protection rights were not violated where no classification was created between different groups of people, and we reverse the Order as to the equal protection violation.

B. Cruel and Unusual Punishment

¶ 16 Here, the trial court concluded "[b]y his being prosecuted as an adult in this case, Defendant's [Eighth] Amendment right against cruel and unusual punishment is being violated." Defendant's *Motion to Dismiss* contended his right to be protected from cruel and/or unusual punishment was violated under the North Carolina Constitution and the United States Constitution and stated "our Court 'historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the [F]ederal and [S]tate Constitutions.' " In a footnote in his *Motion to Dismiss*, Defendant contended "North Carolina's 'cruel or unusual' clause is broader than the federal 'cruel and unusual' one[,]" but then stated "[Defendant] is entitled to relief under the narrower 'cruel and unusual' punishment formulation and will focus his arguments there."

¶ 17 We have held:

> Article I, Section 27 of the North Carolina Constitution prohibits the infliction of "cruel *or* unusual punishments." N.C. Const. art. I, § 27. The wording of this provision differs from the language of the Eighth Amendment, which prohibits the infliction of "cruel *and* unusual punishments." U.S. Const. amend. VIII.
>
> Despite this difference in the wording of the two provisions, however, our Supreme Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the [F]ederal and [S]tate Constitutions. Thus, because we have determined that [the] [d]efendant's sentence does not violate the Eighth Amendment, we likewise

> conclude it passes muster under Article I, Section 27 of the North Carolina Constitution.

State v. Seam, 263 N.C. App. 355, 365, 823 S.E.2d 605, 612 (2018) (marks and citations omitted), *aff'd per curiam*, 373 N.C. 529, 837 S.E.2d 870 (2020). Accordingly, we only analyze this issue under the United States Constitution as it applies with equal force to the North Carolina Constitution.

¶ 18 As an initial matter, the State argues the trial court should not have applied the Eighth Amendment to the present case because Defendant had not been punished at the time of the motion.

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. Thus, in *Trop v. Dulles*, [356 U.S. 86, 2 L. Ed. 2d 630] (1958), the plurality appropriately took the view that denationalization was an impermissible punishment for wartime desertion under the Eighth Amendment, because desertion already had been established at a criminal trial. But in *Kennedy v. Mendoza-Martinez*, [372 U.S. 144, 9 L. Ed. 2d 44] (1963), where the Court considered denationalization as a punishment for evading the draft, the Court refused to reach the Eighth Amendment issue, holding instead that the punishment could be imposed only through the criminal process. As these cases demonstrate, *the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.* Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

Ingraham v. Wright, 430 U.S. 651, 671 n.40, 51 L. Ed. 2d 711, 730 n.40 (1977) (emphasis added) (citations omitted); *see also Moore v. Evans*, 124 N.C. App. 35, 51, 476 S.E.2d 415, 426-27 (1996) (citation omitted) ("In a related argument, [the plaintiff] further contends that [the] defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. The United States Supreme Court stated in *Ingraham v. Wright*, 'An examination of the history of the [Eighth]

Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.' Therefore, we find that the Eighth Amendment is inapplicable to the present case, as [the plaintiff] was never formally adjudicated guilty of any crime.").

¶ 19 Defendant contends, however, that being automatically tried as an adult is covered by the Eighth Amendment, which in part "imposes substantive limits on what can be made criminal and punished as such[.]" *See Ingraham*, 430 U.S. at 667, 51 L. Ed. 2d at 728. *Ingraham* stated:

> [T]he Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and *third*, *it imposes substantive limits on what can be made criminal and punished as such*. We have recognized the last limitation as one to be applied sparingly. The primary purpose of the Cruel and Unusual Punishments Clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes.

Id. at 667, 51 L. Ed. 2d at 727-28 (citations and marks omitted) (emphasis added). The United States Supreme Court then referred to *Robinson v. California* as an example of the third category. *Id.* at 667, 51 L. Ed. 2d at 728 (citing *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758 (1962)).

¶ 20 In *Robinson*, the United States Supreme Court held that a statute, making the illness of being addicted to narcotics a criminal offense, violated the Eighth Amendment, reasoning:

> This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that

> a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.
>
> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Robinson, 370 U.S. at 666-67, 8 L. Ed. 2d at 762-63 (citation and footnotes omitted).

¶ 21 We do not identify Defendant being tried as an adult, pursuant to N.C.G.S. § 7B-1604(a) (2015), to be of the same character as a person's illness being criminalized, and it does not trigger the Eighth Amendment's "[imposition of] substantive limits on what can be made criminal and punished as such[.]" *Ingraham*, 430 U.S. at 667, 51 L. Ed. 2d at 728. As an initial matter, our research has not revealed any North Carolina or

United States Supreme Court decision applying the above principle from *Robinson* outside of the status of addiction to drugs or alcohol. *See*, *e.g.*, *Powell v. Texas*, 392 U.S. 514, 532, 20 L. Ed. 2d 1254, 1267 (holding a conviction for being drunk in public was not in the same category discussed in *Robinson*, as "[t]he State of Texas [] [did] not [seek] to punish a mere status, as California did in *Robinson*; nor [did] it attempt[] to regulate [the] appellant's behavior in the privacy of his own home. Rather, it has imposed upon [the] appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for [the] appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community"), *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 185 (1968). Further, the prosecution of juveniles as adults does not involve the substance of what is made criminal, and instead involves the procedure taken regarding a criminal offense alleged against juveniles. Here, the substance is properly criminally punished as Defendant was charged with felonious breaking and entering and larceny after breaking or entering, offenses that are undoubtedly within the police powers of North Carolina. The situation Defendant faces here cannot be said to be analogous to *Robinson* because his prosecution as an adult does not criminalize a status, but instead punishes criminal behavior by juveniles according to the procedures in place at the time of the offense.

¶ 22 Defendant has no claim under the Eighth Amendment. Instead, to the extent Defendant claims the State punished him prior to a conviction, this claim properly falls under due process.[4] On this basis, we reverse the Order as to the cruel and unusual punishment violation.

C. Due Process

¶ 23 Relying on *Kent v. United States*, 383 U.S. 541, 16 L. Ed. 2d 84 (1966), the trial court concluded Defendant's due process rights were violated because he was automatically prosecuted as an adult in this case "without a hearing and findings in support of transfer." As it was unclear whether the trial court's conclusion included both procedural and substantive due process, we analyze both.

> Our courts have long held that the law of the land clause has the same meaning as due process of law under the Federal Constitution. Due process provides two types of protection for individuals against

4. We note Defendant did not make an argument recognizing this distinction at the trial court or on appeal.

> improper governmental action. Substantive due process protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty. Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner.
>
> Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained. Thus, substantive due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.
>
> The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be at a meaningful time and in a meaningful manner.
>
> In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.

State v. Fowler, 197 N.C. App. 1, 20-21, 676 S.E.2d 523, 540-41 (2009) (marks and citations omitted), *disc. rev. denied*, *appeal dismissed*, 364 N.C. 129, 696 S.E.2d 695 (2010). "The requirements of procedural due process apply only to the *deprivation* of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Johnston v. State*, 224 N.C. App. 282, 305, 735 S.E.2d 859, 875 (2012), *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013). "Once a protected life, liberty, or property interest has been demonstrated, the Court must

inquire further and determine exactly what procedure or 'process' is due." *State v. Stines*, 200 N.C. App. 193, 196, 683 S.E.2d 411, 413 (2009) (marks omitted).

¶ 24 Here, the trial court did not clearly find the existence of a fundamental right or a protected interest; however, it did cite *Kent v. United States* in its discussion of due process. *See Kent*, 383 U.S. at 544, 16 L. Ed. 2d at 88. To the extent that the trial court concluded a fundamental right to or a protected interest in being prosecuted as a juvenile existed, it erred. Defendant does not present, and our research does not reveal, any case that holds there is a protected interest in, or fundamental right related to, being tried as a juvenile in criminal cases, as opposed to being tried as an adult. We decline to create such a right under the veil of the penumbra of due process.

¶ 25 Further, *Kent*, which the trial court and Defendant cite, is not controlling or instructive on the issues raised by Defendant. In *Kent*, a sixteen-year-old boy was charged with housebreaking, robbery, and rape. *Id.* at 543-44, 16 L. Ed. 2d at 87-88. At that time, according to the applicable statutes in Washington, D.C., the juvenile court had exclusive jurisdiction over the petitioner due to his age; however, the juvenile court could elect to waive jurisdiction and transfer jurisdiction to the district court after a full investigation. *Id.* at 547-48, 16 L. Ed. 2d at 90. After the petitioner's attorney filed a motion in opposition to the juvenile court's waiver of jurisdiction, the juvenile court, without ruling on the motion, holding a hearing, or conferring with the petitioner, entered an order transferring jurisdiction to the district court that contained no findings or reasoning. *Id.* at 545-46, 16 L. Ed. 2d at 88-89. The United States Supreme Court held:

> [The] petitioner–then a boy of 16–was *by statute* entitled to certain procedures and benefits as a consequence of his *statutory right* to the "exclusive" jurisdiction of the [j]uvenile [c]ourt. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the [d]istrict [c]ourt was potentially as important to [the] petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, [the] petitioner [was] entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the

> [j]uvenile [c]ourt's decision. *We believe that this result is required by the statute read in the context of constitutional principles relating to due process* and the assistance of counsel.

Id. at 557, 16 L. Ed. 2d at 95 (emphases added).

¶ 26 Based on this language, in the context of the facts of *Kent*, we conclude *Kent* involved a completely distinct factual situation at the outset—there, the petitioner was statutorily entitled to begin his proceedings within the exclusive jurisdiction of the juvenile court; whereas, here, under N.C.G.S. § 7B-1604(a) (2015), Defendant's proceedings began in Superior Court. This statutory distinction is critical because the United States Supreme Court in *Kent* explicitly based its holding on due process's interaction with the requirements of the applicable statute. *Id.* Furthermore, it is clear *Kent* does not require a hearing and findings to support trying *any* juvenile as an adult; instead, *Kent* requires hearings and findings to support the *transfer* of a juvenile from juvenile court to adult court when that is the existing statutory scheme. *Id. Kent* did not create a fundamental constitutional right or constitutionally protected interest to a juvenile hearing or being tried as a juvenile. Furthermore, our Supreme Court, in interpreting *Kent*, has stated:

> In *Kent*, the Supreme Court enunciated a list of factors for the Juvenile Court of the District of Columbia to consider in making transfer decisions. . . . [I]t is important to note that the Supreme Court *nowhere stated in Kent that the above factors were constitutionally required.* In appending this list of factors [to consider in making transfer determinations] to its opinion, *the Kent Court was merely exercising its supervisory role over the inferior court created by Congress for the District of Columbia.* Thus, the factors in the Appendix to *Kent* have no binding effect on this Court.

State v. Green, 348 N.C. 588, 600-01, 502 S.E.2d 819, 826-27 (1998) (emphases added), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999), *superseded by statute on other ground as stated in In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000). Our Supreme Court's interpretation of *Kent* in *Green*, as not concerning constitutionally required factors for the transfer of juveniles from juvenile court to adult court, further supports our conclusion that *Kent* was not concerned with constitutional requirements. *Id.*

¶ 27 The trial court clearly considered *Kent* in concluding that Defendant's due process rights were violated. The only other finding of fact that the trial court used to support the conclusion of law related to due process stated "[a]s of [1 December 2019], North Carolina will no longer permit a sixteen-year-old charged with class H Felonies to be automatically prosecuted, tried and sentenced as an adult." This finding alone does not support concluding that Defendant's due process rights were violated. Further, the Order does not otherwise conduct the required steps of a due process analysis, as there was no finding or conclusion that the statute impacted a fundamental right, implicating enhanced scrutiny under substantive due process, or deprived Defendant of "a protected life, liberty, or property interest[,]" implicating procedural due process protections. *Stines*, 200 N.C. App. at 196, 683 S.E.2d at 413.

¶ 28 There was not a protected interest at issue before the trial court and Defendant's procedural due process protections were not implicated. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). Additionally, turning to substantive due process, as there is not a fundamental right at issue here, we apply the rational basis test. *See Fowler*, 197 N.C. App. at 21, 676 S.E.2d at 540-41. "The 'rational basis' standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government." *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983).

> [U]nless legislation involves a suspect classification or impinges upon fundamental personal rights, the mere rationality standard applies and the law in question will be upheld if it has any conceivable rational basis. Moreover, the deference afforded to the government under the rational basis test is so deferential that a court can uphold the regulation if the court can *envision* some rational basis for the classification.

Clayton v. Branson, 170 N.C. App. 438, 455, 613 S.E.2d 259, 271 (marks omitted), *disc. rev. denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).

¶ 29 Here, there is a rational basis for the statute, despite the trial court's finding otherwise in Finding of Fact 31.[5] North Carolina has a

5. The State challenges Finding of Fact 31 in its brief. Additionally, Finding of Fact 31 is more properly classified as a conclusion of law because it requires the application of legal principles. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (citations omitted)

legitimate interest in promoting the permanency of a sentence, and also has a legitimate interest in updating statutes to reflect changing ideals of fairness. *See Engle v. Isaac*, 456 U.S. 107, 127, 71 L. Ed. 2d 783, 800, *reh'g denied*, 456 U.S. 1001, 73 L. Ed. 2d 1296 (1982). The change the General Assembly made to increase the age at which a person is treated as a juvenile is rationally related to the State's legitimate interests in having statutes that reflect current ideals of fairness, as the statute directly effectuates the legitimate interest in having fair sentencing statutes. The decision to prosecute and sentence juveniles under the statutory scheme in place at the time they commit their offense is rationally related to the State's legitimate interest in having clear criminal statutes that are enforced consistently with their contemporaneous statutory scheme.[6] Prosecuting Defendant as an adult within the jurisdiction of the Superior Court was not a violation of substantive or procedural due process based simply upon the findings of fact regarding an impending change in how juveniles are prosecuted under the law and *Kent*, which held that a violation of due process occurred when a juvenile's statutory right to the juvenile court having exclusive jurisdiction was violated without any hearing, findings, or reasoning. To the extent the trial court relied on *Kent* and due process generally to support its conclusion that Defendant's due process rights were violated, the trial court erred and we reverse the Order to the extent that it is based on this perceived constitutional violation.

¶ 30 Defendant's constitutional rights were not violated, much less flagrantly so, as required for the grant of his *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4). As there were no flagrant violations of Defendant's constitutional rights, we need not address whether Defendant was irreparably prejudiced. We reverse the Order granting Defendant's *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4).

CONCLUSION

¶ 31 The challenged and unchallenged findings of fact do not support concluding there was any violation of Defendant's constitutional rights

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(holding "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law"). As a conclusion of law, we review whether there was a rational basis for this statute de novo. *See Williams*, 362 N.C. at 632, 669 S.E.2d at 294 ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

6. Our appellate courts have consistently required this approach in the context of sentencing. *See, e.g.*, *State v. Whitehead*, 365 N.C. 444, 447, 722 S.E.2d 492, 495 (2012) ("Trial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense.").

to equal protection, to be protected from cruel and unusual punishment, or to substantive or procedural due process. The trial court erred in granting Defendant's *Motion to Dismiss* under N.C.G.S. § 15A-954(a)(4).

REVERSED AND REMANDED.

Chief Judge STROUD and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
DEVONTE GLENN JONES, DEFENDANT

No. COA20-173

Filed 2 November 2021

1. Evidence—present recollection refreshed testimony—admissibility—not recitation of letter

In a prosecution arising from a shooting into an occupied vehicle, the trial court did not abuse its discretion by allowing a State witness, who was a jailhouse informant, to testify after reviewing a letter he had written to the district attorney with information inculpating defendant. It was not clear that the witness was merely reciting the letter or using it as a testimonial crutch; rather, the witness testified to the subject matter of the letter before he reviewed it to refresh his recollection, and he testified to additional details that were not contained in the letter.

2. Evidence—prior consistent statement—admissibility—letter written by witness

In a prosecution arising from a shooting into an occupied vehicle, the trial court did not err by admitting into evidence a letter that a jailhouse informant witness used during his testimony to refresh his memory, where the letter was admissible as a prior consistent statement to corroborate the informant's testimony.

3. Criminal Law—jury instructions—attempted first-degree murder—prejudice analysis

There was no plain error in the trial court's jury instructions on attempted first-degree murder in defendant's prosecution arising from a shooting into an occupied vehicle. In the first place, the trial court was not required to repeat the same jury instructions

for each count of the charge at issue. As for defendant's argument that the trial court plainly erred by using the general attempt and first-degree murder pattern jury instructions instead of the pattern jury instructions specifically on attempted first-degree murder, the appellate court concluded that, even assuming the trial court erred, defendant could not show prejudice under the plain error standard, where the jury found the necessary elements as to other charges for which defendant did not challenge the instructions and the challenged portion of the instructions did not go toward the crux of his defense (an alibi).

4. Judgments—criminal—clerical errors—felony class

Where the amended judgment entered in defendant's criminal case contained a clerical error—incorrectly listing the attempted first-degree murder conviction as a class B1 felony—the case was remanded for correction of the error.

Appeal by defendant from judgment entered on or about 18 June 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.

Daniel J. Dolan for defendant.

STROUD, Chief Judge.

¶ 1 Devonte G. Jones ("Defendant") appeals from an amended judgment[1] entered following a jury trial. The judgment included two counts of each of the following offenses: attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a weapon into occupied property resulting in serious bodily

1. The date on the amended judgment is 18 June 2019, but that date is likely an error. The original judgment was dated 18 June 2019 as well. The motion to amend the judgment—arguing the attempted first degree murder counts were imposed as class B1 / level 1 felonies when they should have been class B2 / level 1 felonies—was filed on 25 June 2019. The order on the motion to amend the judgment and a handwritten note from the judge explaining his reasoning are dated 26 June 2019. Thus, the amended judgment likely was from 26 June 2019 rather than the 18 June 2019 date on the amended judgment itself. Because Defendant has filed a petition for writ of certiorari that we grant—which highlighted this issue— the date discrepancy does not impact our analysis.

injury. Defendant argues the trial court erred in admitting testimony of a witness for the State who refreshed his recollection using a letter he had previously written because the witness used the letter as a testimonial crutch rather than a mere aid. Defendant also argues the trial court erred by admitting the letter into evidence as a prior consistent statement that corroborated the witness's testimony. Because the witness was not merely reciting from the refreshing aid and the letter was properly independently admitted as a prior consistent statement, we find no error as to the letter. In addition to the letter, Defendant argues the trial court plainly erred when instructing the jury on attempted first degree murder. Because Defendant has not shown the alleged errors probably impacted the jury verdict, we also find no error as to the jury instructions. Thus, we conclude there was no error on substantive matters in this case. However, because Defendant correctly indicates the amended judgment contains a clerical error that lists attempted first degree murder as a class B1 felony rather than class B2 felony, we remand to the trial court for correction of this error.

I. Background

¶ 2 The State's evidence tended to show that on the night of 9 September and the early morning hours of 10 September 2017, Leroy Brickhouse, his cousin Marlon Taylor, his co-worker Mike Jeffreys, and others were going out in downtown Raleigh to celebrate Taylor's upcoming birthday. During the night out, the group got into a verbal altercation with another group of people that included Defendant. Police in the area quickly intervened and broke up the altercation. About 45 minutes after the altercation, Brickhouse and Taylor returned to their cars. As Brickhouse's coworker was saying goodnight, another car came and obstructed their cars. Defendant exited the other car and began shooting with a semi-automatic rifle at the vehicle with Brickhouse and Taylor inside, as well as at the co-worker's vehicle. The co-worker returned to his vehicle and escaped. While Brickhouse drove away, Defendant continued to fire at his vehicle, and both Brickhouse and Taylor were shot. Brickhouse was shot in the chest, and Taylor was shot in the head. Defendant was arrested for the shootings and charged with two counts each—one set for Brickhouse and one set for Taylor—of: Attempted First Degree Murder, Assault with a Deadly Weapon with the Intent to Kill Inflicting Serious Injury (AWDWIKISI), Discharging a Firearm into an Occupied Vehicle Resulting in Serious Bodily Injury, Conspiracy to Commit Attempted First Degree Murder, Conspiracy to Commit AWDWIKISI, and Conspiracy to Commit Discharging a Firearm into an Occupied Vehicle Resulting in Serious Bodily Injury.

¶ 3 While in jail awaiting trial, Defendant shared a cell block with Ronald Cameron. Defendant and Cameron talked about Defendant's case, and Cameron wrote a letter to the district attorney detailing their conversations. In the letter, Cameron recounted how he knew Defendant as well as that Defendant told him Defendant was involved with a shooting in Raleigh with an AK-47, Defendant had God with him or he would be facing two murder charges, and that Defendant had asked Cameron to dispose of the weapon for him if Cameron was able to get released on bond.

¶ 4 At trial, Cameron initially testified Defendant told him Defendant was charged with shooting two guys, one in the head and one in the chest, and that God was with him or Defendant would be charged with murder. At that point, Cameron initially said, "I don't think so, sir" when asked if Defendant had mentioned further details. Cameron then mentioned he had written a letter to the district attorney's office detailing his conversations with Defendant. Over Defendant's objections, including that Cameron did not "remember anything else about this" and therefore could not use the letter to refresh his recollection, the trial court allowed the State to use the letter to refresh Cameron's memory. After reading the letter, Cameron said it had refreshed his recollection "[q]uite a bit" such that he "remember[ed] the things [in the letter] from the conversation that me and him [Defendant] had." Cameron then testified he recalled Defendant had said Defendant used an AK-47 in the shooting. Following that, Cameron twice started answers by referencing that he wrote in the letter certain information, was told not to just say what was written, and then said, "I can't say then" when asked if there was any other information that he independently remembered apart from the letter. Following that exchange, Cameron testified further about his conversations with Defendant without additional reference to the letter. The further testimony included Cameron recounting the street name—and later on cross examination a building landmark—where Defendant told him the gun used in the shooting could be found, details which were not included in the letter to the district attorney.

¶ 5 After Cameron finished testifying, the trial court found the letter was properly used to refresh Cameron's recollection. The trial court also admitted the letter itself into evidence, over Defendant's objections, on the grounds that the letter was a prior consistent statement that could be admitted to corroborate Cameron's testimony.

¶ 6 Defendant presented an alibi defense at trial. Defendant admitted he had been in the verbal altercation earlier in the night with the group that included Brickhouse and Taylor. Following the police dispersing the groups involved in the altercation, Defendant spent time searching

for his cell phone after discovering it was lost. Defendant testified he then went to his sister's house and did not know any details about the shooting in downtown Raleigh until he was arrested. Defendant also specifically denied that he told Cameron that he used an AK-47 in the shooting and denied that he asked Cameron to get rid of the gun for him. Defendant's sister and her friend also testified Defendant left Raleigh and went to his other sister's house, and the other sister testified Defendant came and slept at her house.

¶ 7 Following Defendant's case and closing arguments, the trial court instructed the jury. The trial judge primarily relied on the pattern jury instructions when crafting the instructions used in this case. He also explained to the parties that his plan was to give each instruction only once even though there were two counts of each charge, although he made clear he was "glad to hear your [the parties'] suggestions on this." Aside from asking to have language relating to an alibi defense read during the instructions on each substantive offense rather than only the first one, which the trial court rejected, Defendant did not offer any suggestions, corrections, or objections to the instructions. Defendant also did not object after the instructions were read to the jurors.

¶ 8 The jury returned verdicts finding Defendant guilty of all charges. The trial judge arrested judgment as to all six conspiracy counts and entered judgment on the remaining counts. The trial judge amended the initial judgment to correct the classification of attempted first degree murder from a Class B1 / Level One judgment to a Class B2 / Level One judgment, and Defendant was sentenced to 140 to 180 months imprisonment. However, while the first page of the amended judgment covering 17CRS221514 reflects attempted first degree murder as a class B2 felony, the last page lists the attempted first degree murder conviction in 17CRS221515 as a class B1 felony.

¶ 9 Defendant gave oral notice of appeal following the announcement of the judgment and filed written notice of appeal following entry of the written judgment. However, Defendant did not file any additional notice of appeal following the entry of the amended judgment. *See supra* footnote 1 (explaining likely date of amended judgment, which is after written notice of appeal was filed on 25 June 2019). Defendant filed a petition for writ of certiorari "[o]ut of an abundance of caution" should we "determine that he has lost his appeal of right."

II. Petition for Writ of Certiorari

¶ 10 Petitions for writs of certiorari can be issued "in appropriate circumstances" to permit review of judgments "when the right to prosecute

an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1); *see also* N.C. Gen. Stat. § 15A-1448 (2019) (indicating the rules of appellate procedure govern issues regarding notice of appeal and petitions for writs of certiorari). In turn, an appeal in a criminal action may be taken by giving oral notice of appeal at trial or by filing a written notice of appeal within fourteen days after entry of the judgment being appealed. N.C. R. App. P. 4(a). Here, Defendant did not renew an oral notice of appeal nor file a written notice of appeal following the entry of the amended judgment, and his petition highlights that absence as the reason a writ of certiorari may be necessary.

¶ 11 To the extent a petition for writ of certiorari is necessary, we grant it in our discretion. In *State v. Briggs*, this Court faced a similar issue where the defendant failed to give notice of appeal from an amended judgment. 249 N.C. App. 95, 97, 790 S.E.2d 671, 673 (2016). The State did not address the issue, and the defendant did not file a separate petition for a writ of certiorari, but this Court decided to treat the defendant's appellate brief as a petition and granted it. *Id.* Here, the State similarly did not file any response to Defendant's petition or raise the issue in its brief. Unlike in *Briggs*, Defendant here went further and filed a petition. As in *Briggs*, we grant the petition for a writ of certiorari to the extent it is necessary.

III. Issues Related to the Letter to the District Attorney

¶ 12 Defendant argues the trial court erred in admitting the testimony of Ronald Cameron, a witness for the State. Defendant contends the trial court erred in allowing Cameron to testify after reviewing a letter he had written to the district attorney with information inculpating Defendant. The trial court then also erred, Defendant argues, by admitting the letter into evidence as a prior consistent statement to corroborate the testimony Cameron had given after he reviewed the letter.

¶ 13 Specifically, Defendant relies on *State v. York*, 347 N.C. 79, 489 S.E.2d 380 (1997), to argue the trial court erred by allowing Cameron to testify while using the letter as a testimonial crutch rather than merely as a means to presently refresh Cameron's recollection. Defendant argues that by having Cameron use the letter as a testimonial crutch, the State was able to "get the information before the jury despite Mr. Cameron's lack of knowledge as to its content." Defendant then contends the trial court "compounded" the error by admitting the letter into evidence alongside Cameron's testimony. Defendant argues this sequence of events ultimately created a situation where "[t]he prosecutor was permitted to bootstrap the evidence in through the letter and the

letter in through the bootstrapped evidence." Defendant finally argues the use of the letter as a testimonial crutch and subsequent introduction of the letter into evidence prejudiced him, thereby entitling him to a new trial.

A. Admissibility of Witness's Testimony After Refreshing Recollection

¶ 14 **[1]** The letter was admitted into evidence as a prior consistent statement to corroborate Cameron's testimony, and Cameron's testimony in part came after reviewing the letter on the grounds of refreshing his recollection. Therefore, the first issue to address is whether the letter was properly used to aid Cameron's testimony by refreshing his recollection or whether it was impermissibly used as a testimonial crutch.

1. Standard of Review

¶ 15 Defendant states, and the State agrees, this issue should be reviewed *de novo*. But cases involving a witness's use of a memory aid to refresh his recollection are reviewed for abuse of discretion. *State v. Black*, 197 N.C. App. 731, 733, 678 S.E.2d 689, 691 (2009) (citing *State v. Smith*, 291 N.C. 505, 518, 231 S.E.2d 663, 672 (1977)).[2] "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.*, 197 N.C. App. at 733, 678 S.E.2d at 691 (citation and quotation marks omitted).

2. Analysis

¶ 16 In *Smith*, our Supreme Court addressed the legal rules regarding present recollection refreshed testimony. First, *Smith* distinguished use of an item to aid a witness to refresh recollection from a writing or recording used as a past recollection recorded, which is now done pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5) (2019). 291 N.C. at 516, 231 S.E.2d at 670. Present recollection refreshed involves witnesses with a "sufficiently clear recollection" such that writings, memoranda or other aids " 'jog[]' " their memories so that they can testify from their own recollection. *Id.* Because the testimony comes from the witness's own independent recollection, present recollection refreshed does not involve "fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *Id.*, 291 N.C. at 516, 231 S.E.2d at 670–71. However, because the standards around

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2. As *Black* explains, *York*, upon which Defendant relies, is "a later case which applied *Smith*." 197 N.C. App. at 735, 678 S.E.2d at 692.

present recollection refreshed are looser, the aid must also "actually 'refresh' " the witness's memory. *Id.*, 291 N.C. at 517–18, 231 S.E.2d at 671. "Where the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge." *Id.*, 291 N.C. at 518, 231 S.E.2d at 671 (emphasis in original). If there is "doubt as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury." *Id.*, 291 N.C. at 518, 231 S.E.2d at 671–72.

¶ 17 In *Smith*, the evidence was contradictory as to whether a transcript refreshed the witness's memory or gave her a script to recite at trial. *Id.*, 291 N.C. at 517, 231 S.E.2d at 671. At times the witness said the testimony was from her own memory, but at other times she said some of it was from her memory and some of it was not. *Id.* Because the witness did not clearly merely recite the refreshing transcript, the Supreme Court found no abuse of discretion in the trial judge's decision not to strike the testimony. *Id.*, 291 N.C. at 518, 231 S.E.2d at 671–672.

¶ 18 In *York*, the Supreme Court then further explained the test of admissibility of testimony based upon refreshed recollection. First, the Supreme Court explained that it would "elevate form above substance" to focus on whether a witness appears to read from a refreshing aid. *See York*, 347 N.C. at 89, 489 S.E.2d at 386 (explaining a witness appearing to read from a refreshing memorandum is not a per se violation). Rather, the reviewing court examines "whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *Id.* Using that test, the court found the notes were used to refresh recollection permissibly. *Id.* The court noted the witness testified from memory and in detail about the events surrounding the interview with the defendant, spoke in the second person—i.e. the defendant stated—throughout his testimony, and answered the prosecutor's questions independent of the notes. *Id.*

¶ 19 This Court has since applied *York* in two published opinions, *Black* and *State v. Harrison*, 218 N.C. App. 546, 721 S.E.2d 371 (2012). In *Black*, the defendant argued a witness for the State "merely parroted" the information in the transcript from his interview with police. 197 N.C. App. at 733, 678 S.E.2d at 691. This Court concluded the trial court did not abuse its discretion where the witness "testified to some of the events of the night in question before being shown the transcript . . . was equivocal

about whether or not he remembered making the statements found [in the transcript]" until after hearing the audio recording of the interview, and where the witness "then testified in detail to the events of the night in question, apparently without further reference to the interview transcript." *Id.*, 197 N.C. App. at 736, 678 S.E.2d at 692. This Court ultimately concluded it was "not a case where the witness' testimony was '*clearly* a mere recitation of the refreshing memorandum.' " *Id.* (quoting *Smith*, 291 N.C. App. at 518, 231 S.E.2d at 671 (emphasis in original)).

¶ 20 In *Harrison*, the defendant argued the trial court committed plain error by allowing a witness for the State to read her prior police statement about a conversation with the defendant to the jury as a past recollection recorded, and the State argued the trial court properly admitted the testimony as present recollection refreshed. 218 N.C. App. at 548–50, 721 S.E.2d at 374–75. This Court concluded the statement was used to refresh the witness's recollection. *Id.*, 218 N.C. App. at 552, 721 S.E.2d at 376. This Court also concluded that the witness "was not using her prior statement as a testimonial crutch for something beyond her recall" because the witness "had an independent recollection of her conversation with defendant as well as of making her statement to the investigator . . . affirmed that her recollection had been refreshed . . . testified from memory, and that testimony included some details that were not contained in the statement." *Id.*

¶ 21 Here, this case is "not a case where the witness' testimony was '*clearly* a mere recitation of the refreshing memorandum.' " *Black*, 197 N.C. App. at 736, 678 S.E.2d at 692 (quoting *Smith*, 291 N.C. App. at 518, 231 S.E.2d at 671 (emphasis in original)). First, as in *Black*, Cameron testified to part of his conversation with Defendant before using the letter to refresh his recollection. *Id.* Specifically, Cameron recounted how Defendant had told him that God was with him or Defendant would be in jail for murder. Second, as in *Harrison*, Cameron had independent recollection of sending the letter to the district attorney, testifying about how he wrote the letter before then being handed the letter. *Harrison*, 218 N.C. App. at 552, 721 S.E.2d at 376. Finally, as in *Harrison*, Cameron's testimony included some details that were not contained in the letter. *Id.* Specifically, Cameron twice, once on direct examination and once on cross examination, gave the location of the firearm down to the street where it was located and the nearby building whereas in the letter he only stated that Defendant had told him how to find the weapon. Based on these facts, it is not *clear* that Cameron merely recited the letter after it was used to refresh his recollection and as such the trial judge did not abuse his discretion in allowing Cameron to use the letter to refresh his recollection.

¶ 22 Defendant asserts several reasons we should conclude otherwise, but none of them persuade us that the trial judge abused his discretion. First, Defendant argues Cameron's testimony indicated "he had no other recollection of any alleged conversation's [sic] between him and [Defendant]" before being shown the letter to refresh his recollection. While Cameron did say he did not think Defendant had told him any more facts of the case before being shown the letter, Cameron also testified that he wrote the letter to the district attorney's office, which was an important factor in allowing the witness's testimony in *Harrison*. 218 N.C. App. at 552, 721 S.E.2d at 376. Further, a witness's lack of ability to recall additional information is the very reason the present recollection refreshed doctrine exists. *See Smith*, 291 N.C. at 516, 231 S.E.2d at 670 (recounting how the ability to recall is "subject to obvious limitations" and present recollection refreshed evolved as a way to address the issue).

¶ 23 Second, Defendant notes "Mr. Cameron had talked with the prosecutor's [sic] twice before he testified. Then the prosecutor spoke with Mr. Cameron about the letter despite Mr. Cameron still being a witness." The trial judge inquired into the time when the prosecutor spoke with Cameron during a recess in the middle of his testimony. The prosecutor said he asked, "Did it refresh your recollection?" and then did not provide Cameron with any information or "coach him in any way other than ask the question." The trial judge found it was a discovery issue resolved by putting "on the record the substance of the conversation" and found that nothing further needed to be done. Given that record and the fact that no authority we have found suggests this is a relevant consideration for allowing testimony based on a refreshed recollection, we still find the trial judge did not abuse his discretion in allowing Cameron's testimony.

¶ 24 Third, Defendant points out that "the prosecutor asked Mr. Cameron many leading questions about things stated in the letter." The prosecutor did ask Cameron some leading questions, but Defendant's attorney did not object to the questions. Further, as Defendant points out in a footnote in his own brief, the Supreme Court has ruled that leading questions may be allowed when "aid[ing] the witness's recollection." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 236 (1974).

¶ 25 Fourth, Defendant alleges evidence of error in that Cameron "gave generalized details about a shooting" and initially testified about details "not even included in the letter." The generalized statements indicate the lack of ability to recall that present recollection refreshed aims to address. *See Smith*, 291 N.C. at 516, 231 S.E.2d at 670 (recounting the reason for present recollection refreshed doctrine). Further, as laid

out above, Cameron's testimony about details not included in the letter refutes rather than supports Defendant's position because it indicates a witness did not clearly give a mere recitation of the refreshing aid. *See Harrison*, 218 N.C. App. at 552, 721 S.E.2d at 376 (finding no error in part because witness recalled events outside the refreshing aid).

¶ 26 Fifth, Defendant argues the Court "should also factor in the circumstances surrounding the witness in determining if the letter was used as a testimonial crutch" before pointing out "Mr. Cameron's credibility was very questionable." We first note Defendant cites no support for the proposition that we should consider the witness's circumstances in this analysis. Even if Cameron's circumstances may call his credibility into question, the credibility of the witness is a question for the jury, including the consideration of whether the witness purporting to have a refreshed recollection is testifying from such recollection. *Smith*, 291 N.C. at 518, 231 S.E.2d at 671–72.

¶ 27 Finally, Defendant notes "Mr. Cameron specifically tried to testify about what was written in the letter rather than from his own independent recollection. Mr. Cameron readily acknowledged that he could not answer if there was other information that he independently remembered apart from the letter." Defendant later discusses this same point in the trial proceedings when trying to distinguish *Black*. According to Defendant, unlike the witness in *Black*, Cameron allegedly "needed to further refer to State's Exhibit 152 [the letter] in order to testify." Defendant is correct that a couple of times Cameron started answers by saying that he wrote in the letter certain information and that he responded, "I can't say then" when asked if there was any other information that he independently remembered apart from the letter. However, immediately after that statement, Cameron then said he remembered Defendant telling him an AK-47 assault rifle was used in the shooting and that his cell phone "was dropped." Additionally, before that part of the testimony, Cameron made clear the letter independently refreshed his recollection:

> Q. Now, having reviewed that letter, does that aid you in your testimony at all?
>
> A. Yes, it does.
>
> Q. Does it refresh any recollection about conversations and contents of conversations that you may or may not have had with the defendant.
>
> A. Quite a bit, sir.
>
> Q. Why does it quite a bit refresh your recollection?

> A. There are some things that I left out that after re-reading what I wrote the first time when it was fresh in my head that I put when I first put it down on paper that it brought it back.
>
> Q. Now that you have read it and brought it back, *does it bring it back only because you read it or do you have an independent recollection, remember those things?*
>
> A. *No, I remember the things from the conversation that me and him had.*

(Emphasis added.) Thus, at some times, Cameron said he was testifying from memory. In *Smith*, the court faced a similar situation where at times the witness said she was testifying from her own memory and at other times acknowledged some of the testimony was not from her memory. *Smith*, 291 N.C. at 517, 231 S.E.2d at 671. There, the court found the trial judge did not abuse his discretion in allowing the testimony because the witness did not clearly provide a mere recitation of the refreshing memorandum. *Id.*, 291 N.C. at 518, 231 S.E.2d at 671–72. Likewise here, it is not *clear* Cameron was merely reciting the letter at trial or using it as a testimonial crutch, so we find that the trial judge's decision to allow the testimony does not amount to an abuse of discretion.

B. Admissibility of the Letter

¶ 28 **[2]** Having concluded the letter was properly used to refresh Cameron's recollection, we now turn to the second issue Defendant raises in relation to the letter, whether it was error to admit the letter into evidence.

1. Standard of Review

¶ 29 "When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). Here, Defendant objected that the letter was an out-of-court statement—and therefore inadmissible hearsay—when the State made a motion to get a ruling on the letter's admissibility outside of the presence of the jury and later renewed his objection when the State moved in front of the jury to admit the letter. Therefore, we review *de novo* the admission of the letter into evidence.

2. Analysis

¶ 30 "[A] writing used to refresh recollection is not admissible because it was used to refresh the witness's recollection, but it may be admissible

for independent reasons." *Harrison*, 218 N.C. App. at 551, 721 S.E.2d at 375; *see also State v. Spinks*, 136 N.C. App. 153, 160, 523 S.E.2d 129, 134 (1999) ("The use of a document in order to refresh a witness' recollection does not make it admissible if offered by the party calling the witness, although it may be admissible for other reasons."). Thus, the question is whether there was an independent basis to admit the letter into evidence.

¶ 31 In admitting the letter into evidence, the trial court made clear the independent basis upon which its ruling relied. Specifically, the trial court found the letter was admissible as a "prior consistent statement[] to corroborate the person's testimony." The trial court made this ruling over the objections of Defendant that the letter was not a prior recorded recollection under North Carolina General Statute § 8C-1, Rule 803(5) (2019) and was an out of court statement to the extent it was used to refresh Cameron's recollection. As the trial court's ruling already contains a potential independent ground of admission, we rely on that potential ground. Thus, the question is whether the trial court erred in ruling the letter was admissible as a prior consistent statement.

¶ 32 Admission of prior consistent statements is "[o]ne of the most widely used and well-recognized methods of strengthening the credibility of a witness." *State v. Locklear*, 320 N.C. 754, 761–62, 360 S.E.2d 682, 686 (1987). The idea behind the method "rests upon the obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen [the witness'] credit before the jury." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990) (quoting *Jones v. Jones*, 80 N.C. 246, 249 (1879)) (alteration in original).

¶ 33 Prior consistent statements are admissible because they are "not offered for their substantive truth and consequently [are] not hearsay." *Id.* "To be admissible, the prior consistent statement must first [ ] corroborate the testimony of the witness." *State v. Lee*, 348 N.C. 474, 484, 501 S.E.2d 334, 341 (1998). Corroborating statements "strengthen" and "add weight or credibility to a thing by additional and confirming facts or evidence." *Levan*, 326 N.C. at 166, 388 S.E.2d at 435 (internal quotations omitted). Still, the statements offered as prior consistent statements need not align precisely with the testimony of the witness whose credibility will be strengthened. The prior statement "may contain new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Ligon*, 332 N.C. 224, 237, 420 S.E2d 136, 143 (1992) (internal quotations omitted); *see also Locklear*, 320 N.C. at 762, 360 S.E.2d at 686 ("If previous statements offered in corroboration are generally consistent with the

witness' testimony, slight variations between them will not render the statements inadmissible."). But a past statement that "actually directly contradict[s] . . . sworn testimony" is not admissible as a prior consistent statement. *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) (quoting *State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988)) (ellipses in original).

¶ 34 The letter at issue here qualifies as a prior consistent statement under those standards. The letter corroborates Cameron's testimony both as to how he came to have the information about Defendant's crime as well as the information about Defendant's crime to which Cameron testified. The letter reinforces Cameron's testimony that he knew Defendant as "Jones" or "Rage" and that they shared a cell block together. Further, the letter corroborates Cameron's testimony regarding the location of the shooting on Glenwood Avenue, that Defendant used an AK-47 in the shooting, that Defendant lost his cell phone at the scene of the shooting, and that Defendant told Cameron God was with Defendant or he would be facing a murder charge. The letter is thus exactly the type of confirming evidence that defines corroboration. *Levan*, 326 N.C. at 166, 388 S.E.2d at 435.

¶ 35 Cameron's testimony only diverged from the letter on one occasion, and that instance does not undermine the letter's status as a prior consistent statement. In the letter, Cameron wrote that Defendant's co-defendant was "his sister [sic] baby daddy." (Capitalization altered.) At trial, Cameron initially testified Defendant said his co-defendant was "his baby mama's brother or something like that" before admitting on cross, "I don't remember exactly." Cameron's testimony indicates he failed to remember something he wrote in the letter. Since the letter did not "actually directly contradict[]" Cameron's testimony, this difference does not undermine the letter's status as a prior consistent statement. *See McDowell*, 329 N.C. at 384, 407 S.E.2d at 212 (explaining an actual direct contradiction prevents evidence from being a prior consistent statement) (internal quotations omitted).

¶ 36 Defendant's own prior challenge to Cameron's use of the letter to refresh his recollection reinforces how the letter is a prior consistent statement. Defendant argues on the refreshed recollection issue that the State was able to "get the information before the jury despite Mr. Cameron's lack of knowledge as to its content." In other words, Defendant argues Cameron only testified to the contents of the letter itself because he did not remember anything independently of the letter. While above we found Cameron independently recalled the conversations to which he testified, that ruling does not change the similarity

between Cameron's testimony and the letter that Defendant highlights. That parallel between the testimony and letter makes the letter a prior consistent statement. *See Levan*, 326 N.C. at 166, 388 S.E.2d at 435 (defining corroboration to include "confirming facts or evidence" (internal quotations omitted)).

¶ 37 Defendant makes two arguments as to why we should conclude the letter is not a prior consistent statement, but neither argument persuades us. First, Defendant argues "the jury was not provided with a limiting instruction that State's Exhibit 152 [the letter] was only to be used for corroborative purposes." However, Defendant did not request a limiting instruction when the letter was introduced into evidence. By failing to request the instruction, Defendant waived the issue on appeal. *State v. Joyce*, 97 N.C. App. 464, 469–70, 389 S.E.2d 136, 140 (1990) (ruling the defendant waived his argument about the lack of limiting instruction as to a statement "for the purpose of corroborating" the out-of-court declarant's in-court testimony because the defendant failed to request such instruction). Additionally, the trial court gave a general jury instruction about "Impeachment or Corroboration by Prior Statement" that made clear the prior statement could only be used for corroborative purposes. (Capitalization altered.)

¶ 38 Second, Defendant notes the "prosecutor did not provide the same rationale for admission" as the trial court, i.e. that the letter was admissible as a prior consistent statement. While the prosecutor did not use the words prior consistent statement, his explanation to the trial court made clear that was the basis. In relevant part, the discussion occurred as follows:

> THE COURT: This is – it was used to do refresh his recollection. It's not a memorandum of a matter which a witness once had knowledge, but now has insufficient recollection.
>
> This was used to refresh his recollection and *it's being offered as a prior consistent statement is my understanding*.
>
> So, Mr. Latour.
>
> MR. LATOUR: In part, that is why it was used then. *Now I am introducing it as the letter that he wrote that was testified about* and that the defendant, through his attorney, asked very specific questions about things that were written in that letter, and therefore I would say it opens the door for that.

> The letter has been authenticated ad nauseam by him that it is something that he wrote. Now whether the contents of it -- I would submit to you none of the contents of it are hearsay and would therefore fall under none of those issues that the defendant is objecting about it being admitted under.

(Emphasis added.) Two parts of this discussion are especially relevant. First, the attorney for the State indicated he was introducing the letter in part based on the fact that Cameron testified about it. Second, the trial judge did not offer the prior consistent statement rationale to the State, rather he believed that is why the State itself had offered the letter into evidence. This distinction makes clear the prior consistent statement reasoning originated with the State rather than the trial court.

¶ 39 Having rejected Defendant's counter arguments, we conclude after *de novo* review that the letter was admissible as a prior consistent statement. Therefore, we conclude the trial court did not err on either issue related to the letter.

IV. Jury Instructions

¶ 40 **[3]** In addition to the arguments related to the letter, Defendant also argues the trial court plainly erred when instructing the jury on attempted first degree murder. Specifically, Defendant first argues the trial court plainly erred when, rather than using the pattern jury instruction for attempted first degree murder, it "fashioned its own instruction[s]" combining the pattern jury instructions on general attempt and on first degree murder. Defendant also contends the trial court should have included the elements of attempted first degree murder in the final mandates. Finally, Defendant asserts plain error on the basis that the trial court only provided instructions on the first count of attempted first degree murder and did not repeat the instructions for the second count. Defendant then argues the erroneous instructions "resulted in fundamental error that had a probable impact on the jury's verdict" because there was not "overwhelming evidence of guilt" in this case, thereby addressing the prejudice prong of plain error. As a result, Defendant asserts he is entitled to a new trial.

A. Standard of Review

¶ 41 Defendant admits he did not object to the allegedly erroneous jury instructions at trial and therefore argues plain error should apply. While the State also says plain error should apply, it argues in a footnote that in the past this would have been invited error under *State v. White*,

349 N.C. 535, 508 S.E.2d 253 (1998). The State contends this standard was only recently modified by this Court in *State v. Chavez*, 270 N.C. App. 748, 842 S.E.2d 128 (2020). As the State notes, the North Carolina Supreme Court reviewed *Chavez*. *State v. Chavez*, 2021-NCSC-86. While the Supreme Court did not address the invited error versus plain error issue directly, it applied plain error review in a case where the defendant did not object to an allegedly erroneous jury instruction on conspiracy to commit murder. *Id.* ¶¶ 10–11. Based on that ruling and the fact that plain error review typically applies to instructional error, we will apply plain error review, rather than review for invited error.[3] *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

¶ 42 In the definitive case on plain error, our Supreme Court explained:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

Id., 365 N.C. at 518, 723 S.E.2d at 334 (internal quotations, citations, and alterations omitted). Put another way, if a defendant cannot show the alleged error prejudiced him, he cannot meet the plain error standard. *See id.*, 365 N.C. at 518–19, 723 S.E.2d at 334–35 (finding the defendant failed to meet his burden to show plain error when he could not show the jury probably would have reached a different verdict even when the erroneous nature of the jury instruction was "uncontested"); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) ("The adoption of the 'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial.").

B. Analysis

¶ 43 Defendant asserts plain error as to the trial court's jury instructions on attempted first degree murder. First, Defendant argues the trial court

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3. The standard of review also does not impact our decision because regardless, as explained below, Defendant cannot show prejudice.

plainly erred when it "did not provide any substantive instruction as to the second count of attempted first degree murder" but rather "merely told the jury that it had previously provided the instruction and they applied there as well." Defendant does not explain how repeating the same instruction he alleges was erroneous would have helped the jury. Further, the trial court allowed the jury to take the written instructions to the jury room during deliberation, so if they needed to review the instructions again, they could have read them rather than hear them for a second time. Finally, Defendant cites no authority requiring repeating the same jury instruction twice when a defendant faces multiple counts. For those reasons, it is not clear the trial court erred, let alone plainly erred, with respect to not giving the attempted first degree murder instructions again for the second count.

¶ 44 Defendant's main argument centers on a dispute over the use of the general attempt and first degree murder pattern jury instructions, N.C.P.I. – Criminal 201.10 (2011) (general attempt charge) and 206.10 (2019) (first degree murder), rather than the pattern jury instruction specifically on attempted first degree murder, N.C.P.I. – Criminal 206.17A (2003). Defendant at one point even argues the trial court used its "own instructions," implying the pattern instructions were not used at all. The State asserts the trial court's instructions "reveal adherence to the 2019 supplement" to the North Carolina pattern jury instructions on first degree murder, which was then combined with the general attempt charge.[4] The conflict centers on pattern jury instructions because the Supreme Court has "encouraged" using them, although it is not required. *State v. Haire*, 205 N.C. App. 436, 441, 697 S.E.2d 396, 400 (2010) (citing *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004)).

¶ 45 For clarity, we briefly review how the jury instructions in this case relate to those pattern jury instructions. Except for the sentence discussed below, the State is correct that the trial court's instructions follow the pattern jury instructions in N.C.P.I – Criminal 201.10 and 206.10 as those appeared at the time of Defendant's trial, with relevant additions on subjects such as alibi and acting in concert.

¶ 46 We further note that the instructions given conform in large part to the instruction which Defendant now claims was legally required, N.C.P.I. – Criminal 206.17A (2003). Specifically, the jury instructions given at Defendant's trial track the instructions in 206.17A in language—except

4. Footnote 2 in the State's brief cites to N.C.P.I – Criminal 206.17. This citation appears to be a clerical error given the State cited to 206.10, which is the correct cite, in the main text of its brief.

as to the sentence discussed below—as to both elements of attempted murder and as to the definitions of malice, premeditation, and deliberation within the definition of first degree murder. The order of the instructions slightly differs—with the definition of first degree murder coming immediately after the first element (intent to commit first degree murder) in the instructions at trial rather than after both elements—and the definition of first degree murder at trial added instructions on the definitions of proximate cause and intent. The other difference between the instructions given based on 201.10 and 206.10 versus Defendant's preferred instruction on appeal, 206.17A, is the final mandate. The instructions at trial used language about whether Defendant "intended to commit first degree murder" rather than including language that Defendant "attempted to kill the victim" while acting "with malice, with premeditation and with deliberation," a difference about which Defendant separately claims error.

¶ 47 The major difference in the instructions as given and the pattern jury instructions, both the trial court's combination of 201.10 with 206.10 and Defendant's preferred 206.17A, is part of a sentence in the definition of malice. Both 206.10 and 206.17A define "malice" in relevant part as "the condition of mind which prompts a person to [intentionally] take the life of another [intentionally] or *to intentionally inflict serious bodily harm* that[/which] proximately results in another person's[/his] death without just cause, excuse[,] or justification." N.C.P.I. – Criminal 206.10 (2019), 206.17A (2003) (emphasis added) (alteration to reflect difference between 206.10 and 206.17A with intentionally appearing in the first spot in 206.10 and in the second spot in 206.17A). By contrast, the jury instructions in relevant part defined malice as "that condition of mind which prompts a person to take the life of another intentionally or *to intentionally inflict a wound with a deadly weapon upon another* which proximately results in his death, without just cause, excuse or justification." (Emphasis added.)

¶ 48 As Defendant indicates, a wound is not the same as serious bodily harm. Defendant relies on case law defining wound as "an injury to the person by which the skin is broken," *State v. Butts*, 92 N.C. 784, 786 (1885), and serious bodily harm as "such physical injury as causes great pain or suffering." *See State v. Bonilla*, 209 N.C. App. 576, 585, 706 S.E.2d 288, 295 (2011) (so defining while equating serious bodily harm and serious bodily injury). Further, as Defendant highlights, the statutory definition of serious bodily injury in the context of assault requires "substantial risk of death," "serious permanent" harm, or harm that "results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4(a) (2019). These

definitions from statute and case law align with the general legal definitions of the words. *See generally Wounding* and *Serious Bodily Harm*, Black's Law Dictionary (11th ed. 2019).

¶ 49 While the language in that sentence differed, the trial court, in accordance with the pattern jury instructions, then instructed the jury it could infer malice if the State proved beyond a reasonable doubt that Defendant "intentionally inflicted a wound upon the deceased [/victim] with a deadly weapon" that proximately caused the victim's death. N.C.P.I. – Criminal 206.10 (2019), 206.17A (2003) (alteration to demonstrate difference between the two versions of the pattern jury instructions). To the extent this unchallenged part of the pattern jury instructions is in accordance with the law—which we do not address—the difference in language above may not even be error. If intentionally inflicting a wound can lead to an inference of malice, then defining malice to include such an action may not be error.

¶ 50 Regardless, we need not reach a firm conclusion on whether the instruction was an error because assuming arguendo the trial court erred, it was not a plain error; Defendant cannot show prejudice. *See State v. Mumma*, 372 N.C. 226, 241, 827 S.E.2d 288, 298 (2019) (stating the court "need not decide" whether an instruction was improper when the defendant could not show prejudice (internal quotations omitted)); *see also State v. Turner*, 237 N.C. App. 388, 392, 765 S.E.2d 77, 82 (2014) (assuming arguendo instructional error before finding no plain error due to lack of prejudice). To find prejudice a court must conclude that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotations and citations omitted). Here, absent the alleged instructional errors as to the attempted first degree murder charges, Defendant cannot show the jury probably would have reached a different verdict.

¶ 51 First, the jury found the necessary elements as to the other charges for which Defendant does not challenge the jury instructions. Even under Defendant's preferred instruction, N.C.P.I – Criminal 206.17A, malice includes "the condition of mind which prompts a person to take the life of another intentionally," i.e. the intent to kill. The jury separately convicted Defendant of two counts of "assault with a deadly weapon *with intent to kill* inflicting serious injury." (Capitalization altered; emphasis added.) This charge was based on the same action, shooting at Taylor and Brickhouse, as the attempted first degree murder charge, so the jury would have found intent to kill and thus malice even with Defendant's requested jury instruction or any jury instruction that was not erroneous.

¶ 52 Faced with a similar situation in *State v. Allen*, this Court likewise found the defendant could not show prejudice and therefore did not carry his plain error burden. 233 N.C. App. 507, 515, 756 S.E.2d 852, 860 (2014). In that case, the defendant claimed plain error in failing to instruct the jury on self-defense on the charge of discharging a firearm into an occupied vehicle. *Id.*, 233 N.C. App. at 514, 756 S.E.2d at 859. This Court rejected that argument, ruling it was "unlikely that the jury would have reached a different result" if the jury had been instructed on self-defense as to the discharging a firearm charge because the jury had also convicted defendant on attempted first-degree murder and assault even though the trial court gave a self-defense instruction on each of those charges. *Id.*, 233 N.C. App. at 515, 756 S.E.2d at 860. Here, if the jury had been properly instructed as to malice on the attempted first degree murder charge, the jury probably would not have reached a different result because the jury had also convicted Defendant on the assault charge, which, like malice, required finding intent to kill.

¶ 53 Looking to "the crux of the defense" at trial, we again find Defendant cannot demonstrate prejudice. *See State v. Oliphant*, 228 N.C. App. 692, 702, 747 S.E.2d 117, 124 (2013) (finding no prejudice where defendants argued misidentification of both defendants at trial and then made plain error arguments on appeal claiming the jury instructions failed to make clear the guilt or innocence of one defendant was not dependent upon that of the other). Here, Defendant presented an alibi defense at trial. Yet, his plain error arguments focus on whether the jury was properly instructed on malice for the attempted first degree murder charge. The issues do not align because the jury still could have convicted Defendant even if they had received the malice instructions Defendant claims should have been given. At trial, Defendant did not argue he lacked malice but rather that he was not involved at all. Put another way, in convicting Defendant of other charges tied to the shooting the jury rejected Defendant's alibi defense, and even with different instructions on malice, they would have rejected the defense as to attempted first degree murder as well. Thus, Defendant again fails to carry his burden to show the alleged instructional "error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotations and citations omitted).

¶ 54 Defendant's prejudice argument does not convince us otherwise. Defendant argues the allegedly erroneous instructions "had a probable impact on the jury's verdict" because "[t]his is not a case where there was overwhelming evidence of guilt." Overwhelming evidence of guilt can defeat a plain error claim on prejudice grounds. *See id.*, 365 N.C. at

519, 723 S.E.2d at 335 ("In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict."). But the inverse, which Defendant argues, is not true. The "lack of overwhelming and uncontroverted evidence against defendant" does not require "the conclusion that a jury probably would have reached a different result." *State v. Maddux*, 371 N.C. 558, 565, 819 S.E.2d 367, 372 (2018). Thus, even though this case was close, we can still find no prejudice for the reasons laid out above.

¶ 55 Finally, we quickly note an issue with the State's view of prejudice. The State argued Defendant was satisfied with the jury instructions and thus "[u]nder these circumstances, even had the trial court erred, there should can [sic] be no conclusion that the error" resulted in prejudice. The State's argument amounts to an attempt to create invited error by claiming if Defendant did not object to the instructions, there can be no prejudice ever and thus no plain error. We have already concluded plain error is the appropriate standard here. We will not undermine that standard by concluding there can be no prejudice whenever a defendant fails to object to jury instructions and thus must resort to plain error review on appeal. We find no plain error based upon the totality of the jury instructions and the facts of this particular case.

¶ 56 Because we conclude Defendant cannot demonstrate prejudice as to any of the alleged instructional errors, we find that the trial court did not plainly err when instructing the jury on attempted first degree murder.

V. Clerical Error

¶ 57 **[4]** Defendant finally argues the case should be remanded for correction of clerical errors. Specifically, Defendant contends attempted first degree murder is a class B2 felony, but part of the amended judgment lists it as a class B1 felony. To the extent a clerical error exists, the State agrees that the case should be remanded to correct it.

¶ 58 "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (internal quotations and citations omitted). A clerical error is "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Id.* (internal quotations and citations omitted). The Supreme Court has previously recognized that erroneously assigning the wrong

class of felony to a crime is a clerical error. *State v. Hammond*, 307 N.C. 662, 669, 300 S.E.2d 361, 365 (1983).

¶ 59 Here, Defendant correctly states attempted first degree murder is a class B2 felony. *See* N.C. Gen. Stat. § 14-17 (stating first degree murder is a class A felony) and § 14-2.5 (stating an attempt to commit a class A felony is a class B2 felony). Defendant is also correct that the last page of the amended judgment, listing "Additional File No.(s) and Offense(s)" lists the attempted first degree murder conviction in 17CRS221515 as a class B1 felony. (Capitalization altered.) This error happened even though the trial judge in a signed order pursuant to a handwritten note indicated he was amending the original judgment to properly reflect attempted first degree murder as a class B2 felony. Further, the first page of the amended judgment lists the conviction in 17CRS221514 as a class B2 felony. These facts indicate the listing of attempted first degree murder as a class B1 felony in the amended judgment is a clerical error, not an error based on judicial reasoning or determination. *Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696. Therefore, we remand to the trial court for correction of this error.

VI. Conclusion

¶ 60 We find no error as to the substantive issues raised by Defendant. We conclude the trial court did not abuse its discretion in ruling the letter refreshed the witness's testimony. Further, we find after *de novo* review that the letter itself was admissible. We also do not find plain error with regard to the jury instructions on attempted first degree murder.

¶ 61 However, we find the amended judgment contains a clerical error incorrectly listing the attempted first degree murder conviction in 17CRS221515 as a class B1 felony. We remand to the trial court for correction of this error. On remand, the trial court shall amend the judgment to correctly reflect that attempted first degree murder is a class B2 felony.

NO ERROR AND REMANDED.

Judges DIETZ and CARPENTER concur.

STATE v. LANE

[280 N.C. App. 264, 2021-NCCOA-593]

STATE OF NORTH CAROLINA
v.
MATTHEW LANE, JR.

No. COA20-764

Filed 2 November 2021

1. Search and Seizure—motion to suppress—GPS tracking device on car—standing to challenge—common law trespass theory

The trial court in a heroin trafficking case properly denied defendant's motion to suppress because defendant lacked standing, under a common law trespass theory, to challenge the placement of a GPS tracking device on a car he drove for a trip to conduct a heroin transaction. Defendant did not own the car, but rather a potential drug buyer (the original target of law enforcement's investigation) had borrowed it from someone else and then allowed defendant to drive it—with the buyer riding as a passenger—to a source that sold heroin, and defendant could not claim rights in the car as a bailee where he offered no evidence of a bailment. Furthermore, the car's movements were tracked pursuant to a court order—which was supported by probable cause—within the time frame and geographical area authorized by the order.

2. Search and Seizure—motion to suppress—GPS tracking device on car—standing to challenge—reasonable expectation of privacy

The trial court in a heroin trafficking case properly denied defendant's motion to suppress because defendant lacked standing to challenge a court order, supported by probable cause, allowing the placement of a GPS tracking device on a car he drove for a trip to facilitate a heroin sale. Specifically, defendant could not claim a reasonable expectation of privacy—as an overnight guest or regular visitor of a dwelling could assert a reasonable expectation of privacy in that dwelling—in a moving car on a public highway that he occupied only temporarily and for the limited purpose of conducting a single drug transaction.

Appeal by defendant from judgment entered 5 September 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

TYSON, Judge.

¶ 1 Matthew Lane, Jr. ("Defendant") appeals from the judgments entered upon his guilty pleas to attempted trafficking heroin by possession and trafficking heroin by transportation. We affirm.

I. Background

¶ 2 On 5 February 2016, Raleigh Police Detective M.K. Mitchell submitted to the superior court an application under seal for authorization to surreptitiously install and monitor a GPS tracking device for 45 days on a 2006 Acura MDX vehicle owned and registered to Sherry Harris and driven by Ronald Lee Evans, who lived with Harris. In a sworn affidavit accompanying the application, Detective Mitchell explained that he had obtained information through surveillance and a confidential informant that Evans was selling and "trafficking amount[s] of heroin throughout the Raleigh area." Detective Mitchell also requested that police be permitted to use the device to track the vehicle's location throughout the United States during the 45-day period.

¶ 3 That day, Superior Court Judge Brian Collins granted the application, issued the order, and the trafficking device was installed on the Acura. Judge Collins' order found that Detective Mitchell's affidavit provided specific and articulable facts showing probable cause that the vehicle was being used in the commission of criminal offenses and tracking the vehicle's location would provide information relevant and material to the ongoing investigation. The order specifically authorized the device to be installed surreptitiously on Harris' vehicle and that it be "operated and monitored continuously throughout the period of this order including when the subject vehicle is located in a place where there is a reasonable expectation of privacy." Because the vehicle was mobile and due to "the nature of the offenses being committed," Judge Collins' order also requested for officers to be allowed to continue monitoring the device in other jurisdictions within the United States.

¶ 4 The device would text message the Acura's location to Detective Mitchell when the vehicle would start and stop. On the evening of 25 February 2016, Detective Mitchell received a text message the Acura was in Raleigh around 11:40 p.m. The Acura traveled through Virginia and reached New Jersey by 6:05 a.m. the next day. Detective Mitchell then began manually monitoring the Acura's position as it continued to

New York and stopped at an address for a Walgreens drug store. The Acura made another stop for fifteen minutes at a nearby location, and then it left New York traveling south.

¶ 5 Detective Mitchell along with other Raleigh police officers prepared to intercept the vehicle as it entered Wake County. The Acura was observed by officers, who measured its speed with a radar device and through pacing and determined the Acura was speeding approximately 81 miles per hour in a 70 mile per hour zone. The officers initiated a traffic stop of the Acura for speeding.

¶ 6 Officers approached the Acura, smelled the odor of marijuana, determined the vehicle was being driven by Defendant and was occupied by Evans, Aretha Lyles-Awuona, and Douglas Cooley. Officers searched the vehicle and its occupants and recovered 121 grams of heroin. Lyles-Awuona told investigators Evans was included on the trip for him to be introduced by Defendant to the selling source of the heroin in New York, to return for future trips to purchase heroin, and to contribute currency to the purchase of the heroin.

¶ 7 Defendant was indicted on charges of trafficking heroin by possession, trafficking heroin by transportation, and conspiracy to traffic heroin on 4 April 2016. Defendant filed a motion to suppress to challenge the use of the GPS tracking device installed on the vehicle by court order. The State asserted Defendant lacked standing to challenge the GPS tracking device on the Acura because among other things, Defendant was not in possession of the vehicle when the device was installed and Defendant did not have a close relationship to the registered owner of the vehicle. Superior Court Judge Reuben Young concluded that Defendant lacked standing and denied the motion to suppress on that basis. Defendant filed a motion to reconsider the motion to suppress which the trial court denied. Defendant was tried by a jury on 5 September 2019, which resulted in a hung jury.

¶ 8 Rather than to be retried, Defendant pleaded guilty pursuant to a plea agreement to one count of trafficking heroin by transportation and one count of attempted trafficking by possession. Pursuant to the plea agreement, the State dismissed the conspiracy to traffic heroin charge. Defendant preserved his right to appeal the denial of the motion to suppress. Defendant was sentenced to an active term of 90 to 120 months for the trafficking heroin by transportation. Defendant was sentenced to an active term of 35 to 54 months for attempted trafficking heroin by possession to run consecutive to Defendant's sentence for trafficking heroin by transportation. Defendant was fined $100,000. Defendant appeals.

II. Jurisdiction

¶ 9 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(4) and 15A-979(b) (2019).

III. Issue

¶ 10 Defendant argues the trial court improperly denied his motion to suppress evidence from the traffic stop.

IV. Standard of Review

¶ 11 "The standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted). "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation and internal quotation marks omitted).

¶ 12 Findings of fact that "are not challenged on appeal are . . . deemed to be supported by competent evidence and are binding" upon this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal" *de novo*. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

V. Motion to Suppress

¶ 13 Defendant argues the trial court erred in denying his motion to suppress and asserts he has standing to challenge the court-ordered installation of the GPS tracking device on Harris' Acura.

¶ 14 The Fourth Amendment to the Constitution of the United States, as made applicable to the sovereign states through the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

¶ 15 Subject "to a few specifically established and well-delineated exceptions," the Fourth Amendment protects an individual's privacy interests by prohibiting officers from conducting a search without a valid warrant based on probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 29 L. Ed. 2d 564, 576 (1971).

¶ 16 A "search" under the Fourth Amendment occurs in one of two circumstances. First, under the common law trespass theory, a search occurs upon a physical intrusion by government agents into a constitutionally protected area in order to obtain information. *See United States v. Jones*, 565 U.S. 400, 404-05, 181 L. Ed. 2d 911, 918 (2012).

¶ 17 Secondly, under a reasonable expectation of privacy theory, a search occurs without a physical trespass, but the government invades a space to obtain information where an individual holds a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582 (1967). The test under the reasonable expectation of privacy theory requires: (1) "the individual manifested a subjective expectation of privacy in the object of the challenged search[;]" and, (2) "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001).

¶ 18 Our Supreme Court has held: "Before [a] defendant can assert the protection afforded by the Fourth Amendment, however, he must demonstrate that any rights alleged to have been violated were his rights, not someone else's." *State v. Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110 (1994) (citations omitted). Our Supreme Court further held: "A person's right to be free from unreasonable searches and seizures is a personal right, and only those persons whose rights have been infringed may assert the protection of the Fourth Amendment." *Id.* (citations omitted).

¶ 19 "It is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981) (citations omitted).

¶ 20 "Standing requires *both* an ownership or possessory interest and a reasonable expectation of privacy." *State v. Stitt*, 201 N.C. App. 233, 240, 689 S.E.2d 539, 547 (2009) (internal quotation and citation omitted). "A defendant has standing to contest a search if he or she has a reasonable expectation of privacy in the property to be searched." *State v. McKinney*, 361 N.C. 53, 56, 637 S.E.2d 868, 871 (2006).

> [T]he lack of property rights in an invaded area is not necessarily determinative of whether an individual's

> Fourth Amendment rights have been infringed. Nonetheless, there are many instances in which the presence or absence of property rights in an invaded area are the best determinants of an individual's reasonable expectations of privacy.

State v. Alford, 298 N.C. 465, 471, 259 S.E.2d 242, 246 (1979) (internal citations omitted).

¶ 21 Defendant asserts he has standing to challenge the search of a moving motor vehicle on a public highway both under a common law trespass theory established under *Jones* and under a reasonable expectation of privacy theory under *Katz*.

A. Common Law Trespass

¶ 22 **[1]** Here, Detective Mitchell monitored the vehicle's location. In *Jones*, the Supreme Court of the United States held the physical attachment of a GPS tracking device to *the defendant's vehicle* is a trespass. *Jones*, 565 U.S. at 404-05, 181 L. Ed. 2d at 918. The majority utilized a trespass-based rationale holding "the Government's installation of a GPS device on a target's vehicle and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " *Id*. While Defendant here has shown the use of real time GPS tracking is a search, the GPS tracking device in *Jones* was planted on the defendant's vehicle *after* a court's allowance and *outside* of the approved area authorized by the court order. *Id*. at 403, 181 L. Ed. 2d at 917. The asserted intrusion before us was based on probable cause conducted within the time frame and geographic area authorized by the court order. *See also State v. Perry*, 243 N.C. App. 156, 163-64, 776 S.E.2d 528, 534 (2015) ("A court order compelling disclosure pursuant to 18 U.S.C. § 2703(d) [(2018)] 'shall issue only if the governmental entity offers specific and articulatable facts showing there are reasonable grounds to believe that the contents of a wire or electronic communication, or in the records or other information sought, are relevant and material to an ongoing criminal investigation.' ").

¶ 23 Unlike in *Jones*, Defendant's status in the vehicle is not clear. Defendant is not the owner of the Acura and was not an individual authorized by the owner. The owner of the vehicle allowed Evans, the original target of the narcotics investigation to use her vehicle. Defendant asserts he has rights in the Acura, consistent with a bailee of the vehicle, to support standing. Defendant further asserts he was in control of the trip, he knew what location to go, and who to meet to purchase the heroin. Evans was included in the trip for money to purchase the heroin and to meet the contact in New York for future buying

trips. The State concedes Defendant had permission to drive the Acura from Evans, "any driving that was taking place was going on with the permission of Mr. Evans."

¶ 24 A bailment has traditionally been defined as: "A delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu. under an express or implied-in-fact contract. Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title." *Bailment*, Black's Law Dictionary (11th ed. 2019).

¶ 25 "A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee. Delivery by the bailor relinquishing exclusive possession, custody, and control to the bailee is sufficient." *Fabrics, Inc. v. Delivery Service*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 726 (1979) (citations omitted). "[T]he obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract." *Hanes v. Shapiro*, 168 N.C. 24, 31, 84 S.E. 33, 36 (1915).

¶ 26 Here, Defendant offered no evidence of delivery of possession and acceptance to establish a bailment. There is no evidence Defendant had exercised possession and exclusive control of Harris' vehicle. While Defendant knew the route and may have done the majority of the driving, it was in a vehicle Harris owned and that Evans supplied and remained within during the entire trip. Under the common law trespass theory, the trial court properly ruled Defendant does not have standing to challenge the GPS tracking device. Defendant drove Harris' vehicle for the trip at the discretion of Evans, who was present in the vehicle throughout the trip. Defendant's argument is overruled.

B. Reasonable Expectation of Privacy

¶ 27 **[2]** In *Katz*, the Supreme Court of the United States held the installation of a listening device into a public telephone booth *without a warrant* was an unconstitutional search. *Katz*, 389 U.S. at 351, 19 L. Ed. 2d at 582. "It must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." *State v. Scott*, 343 N.C. 313, 328, 471 S.E.2d 605, 614 (1996) (citation omitted). The State argues Defendant cannot assert any reasonable expectation of privacy in Harris' Acura. This Court stated: "temporary occupancy or temporary use of property does not automatically create an expectation of privacy in that property." *State v. Boyd*, 169 N.C. App. 204, 207, 609 S.E.2d 785, 787 (2005).

¶ 28 In *Carpenter v. United States*, __ U.S. __, __, 201 L. Ed. 2d 507, 515-16 (2018), where agents investigating a string of robberies obtained cell phone records of cell site data under a third-party communications order for a 127-day period and a separate 7-day period, the Supreme Court of the United States held it was "an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Id.* at __, 201 L. Ed. 2d at 517-18 (citation and internal quotation marks omitted).

¶ 29 Here, officers were monitoring the travel of a suspected heroin trafficker based upon a court order issued specifically for this vehicle for a limited duration issued on a showing of probable cause. While Defendant may have rested between stints driving the Acura, he has pled no facts to establish a heightened level of privacy while riding in a moving vehicle on a public highway, as a regular visitor or occupant of a dwelling. *See Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 93 (1990) (holding "that [a defendant's] status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable."); *Minnesota v. Carter*, 525 U.S. 83, 90, 142 L. Ed. 2d 373, 393 (1998) ("[The defendants] were . . . not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with [tenant of the apartment], or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household. While the apartment was a dwelling place for [the tenant of the apartment], it was for [the defendants] simply a place to do business.").

¶ 30 "A person traveling in an automobile on public throughfares has *no reasonable expectation of privacy* in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281, 75 L. Ed. 2d 55, 62 (1983) (emphasis supplied). For Defendant, the Acura was a vehicle for a trip to conduct a heroin transaction. Defendant did not have a reasonable expectation of privacy to confer standing to challenge the court order issued on probable cause. *See Stitt*, 201 N.C. App. at 240, 689 S.E.2d at 547. Defendant's argument is overruled.

VI. Conclusion

¶ 31 The trial court correctly concluded Defendant did not have standing to challenge the placement of the GPS tracking device on a vehicle he did not own under a court order based upon probable cause. Defendant has no recognizable legal interests in a vehicle he did not own and was not given authority by the owner to use.

¶ 32 The order of the trial court is affirmed. The judgments and sentences entered upon Defendant's guilty plea remain undisturbed. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
JIMMY BROWN RODRIGUEZ, II

No. COA20-850

Filed 2 November 2021

1. Evidence—prior bad acts—prior rape—relevance—force and consent

In a trial for second-degree forcible rape based on allegations that the victim was physically helpless when defendant engaged in intercourse with her, the trial court did not err by admitting testimony—for the limited purposes of showing absence of mistake, intent to commit the crime, and lack of consent—from a witness who stated that defendant previously raped her. The evidence was still relevant to issues of force and consent, even though the force involved in the alleged rape related by the witness was different than the implied force at issue (given the State's theory that the victim was unable to resist or give consent), and to prove defendant did not mistake the victim's actions and inactions as consent.

2. Evidence—prior bad acts—prior rape—more probative than prejudicial

In a trial for second-degree forcible rape based on allegations that the victim was physically helpless when defendant engaged in intercourse with her, the trial court did not abuse its discretion by finding more probative than prejudicial a witness's testimony that defendant previously raped her, where the court heard the proposed testimony on voir dire, conducted a balancing test pursuant to Evidence Rule 403, and included the testimony only for the purposes of showing absence of mistake, intent to commit the crime, and lack of consent.

STATE v. RODRIGUEZ

[280 N.C. App. 272, 2021-NCCOA-594]

Appeal by Defendant from Judgment entered 1 November 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 21 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Drew Nelson for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Jimmy Brown Rodriguez, Jr. (Defendant) appeals from a Judgment and Commitment entered upon a jury verdict finding him guilty of Second-Degree Rape. The Record tends to reflect the following:

¶ 2 On 3 April 2018, a Wake County Grand Jury indicted Defendant on one count of Second-Degree Forcible Rape against a victim "who was at the time physically helpless" in violation of N.C. Gen. Stat. § 14-27.22 and one count of Incest in violation of N.C. Gen. Stat. § 14-178. On 22 October 2019, prior to trial, Defendant filed a Motion *in Limine* seeking to exclude expected testimony—under Rule of Evidence 404(b)—from a State's witness alleging Defendant had previously forcibly raped the witness. Defendant's case came on for trial on 28 October 2019 in Wake County Superior Court.

¶ 3 At the outset, the trial court heard arguments regarding Defendant's various Motions to exclude certain evidence including the testimony of Brittany Mack (Mack). Defendant's counsel explained that Mack would likely testify Mack and Defendant had been in a three-year relationship and that Defendant had "forced sex" on Mack numerous times including five days prior to the acts giving rise to Defendant's charges in this case. The trial court heard Mack's testimony on *voir dire* that on numerous occasions, while Mack brought her and Defendant's son to visit Defendant, Defendant would direct Mack to his bedroom, lock the door, and force Mack to have intercourse with him. The trial court reserved its ruling on the admissibility of this testimony for later in the proceedings.

¶ 4 Prior to opening arguments and the jury being impaneled, Defendant pled guilty to the charge of Incest. The State gave its opening remarks in which the State explained the evidence would show on 5 March 2018, Defendant engaged in intercourse with his niece, K.F.,[1] after inviting her

1. We use the victim's initials to protect her privacy.

to his residence and drinking alcohol, and the intercourse was "by force and against [K.F.'s] will because she was unable to consent." The State also explained to the jury that Defendant had already pled guilty to a charge of Incest for the acts in question in this case.

¶ 5 The State called K.F. as its first witness. K.F. testified that in January of 2018, she came to North Carolina from Texas to visit family. On the date in question, Defendant asked K.F. to come over to his apartment so that K.F. could "drive him around," and Defendant would "pay [K.F.] to drive him around." Defendant wanted K.F. to drive him around because he had been drinking. K.F. drove Defendant to a liquor store where Defendant bought "a fifth of Jack" and numerous "airplane bottles" of other liquors. Defendant and K.F. went back to Defendant's apartment, and Defendant asked K.F. if she "wanted to drink." K.F. replied that she did. Defendant then made K.F. a drink in a "red solo cup" that contained "a lot of Jack. More than [K.F.] was used to."

¶ 6 Defendant and K.F. then engaged in arm wrestling, and K.F. asked Defendant if he could show K.F. "moves like fighting wise[.]" After about ten minutes, Defendant and K.F. drank more alcohol, and K.F. "started feeling a little bit uncomfortable." According to K.F., Defendant "grazed [her] butt" twice. Then K.F. drank two "shots" of liquor from the airplane bottles Defendant had purchased before Defendant gave K.F. another cup of alcohol. Defendant started to complain about back pain and asked K.F. to "rub IcyHot" on his back. K.F. agreed to do so because she had done that for her boyfriend when he had hurt his back. K.F. applied IcyHot to Defendant's back, then chest, while Defendant was shirtless on the living room floor. Defendant asked K.F. to "straddle" him while she applied IcyHot to his chest, but K.F. did not because she felt it was "inappropriate." K.F. was "pretty buzzed" as she applied IcyHot to Defendant's back and chest. Defendant then leaned in to try and kiss K.F. K.F. tried to "scoot" away from Defendant and ended up on her back while trying to avoid Defendant's continued advances. K.F. told Defendant "no," but Defendant kept trying to kiss her. At some point, K.F. "froze" and could no longer move. K.F. blacked out momentarily and remembered walking into the bedroom where she blacked out again. When K.F. regained consciousness, Defendant was having intercourse with her.

¶ 7 After hearing K.F.'s testimony, the trial court ruled "that the 404(b) evidence as it relates to alleged sexual assault by the defendant on Brittany Mack will be admissible for the limited purposes of showing absence of mistake, lack of consent and intent." The trial court found "that proximity is not at issue as this is alleged acts that most recently occurred five days prior to the alleged sexual assault" in this case, and

that there were similarities between Defendant's alleged rapes of Mack and the circumstances in this case. As such, the trial court reasoned:

> So recognizing that rule 404(b) is a rule of inclusion, I do find that this proffered testimony should be admitted under 404(b). I have conducted the balancing test required by Rule 403 and do find that the evidence is sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test and that the probative value is not outweighed by the prejudicial effect.

¶ 8 The State called Mack as its second witness. Mack testified she started dating Defendant in 2016, and the couple had a child together. Mack later ended her relationship with Defendant, but Mack and Defendant reached an agreement for Defendant to visit Mack and Defendant's son. Mack testified that on numerous occasions, when Mack brought her children to Defendant's apartment so Defendant could visit his son, Defendant "would tell [Mack's] children that he needed to talk to their mother," and Mack would follow Defendant into his bedroom while the children remained in the living room. According to Mack, Defendant "would tell [Mack] to take [her] clothes off or sometimes he would just start taking them off for [Mack]." Then Defendant would, "pick [Mack] up and throw . . . or toss [Mack] on his bed."

¶ 9 Defense counsel objected to Mack's testimony Defendant threw her on his bed. After a bench conference, the trial court instructed the jury:

> Ladies and gentlemen of the jury, evidence is being elicited tending to show that at an earlier time the defendant sexually assaulted Brittany Mack. This evidence is being received solely for the purpose of showing absence of mistake, that the defendant had the intent to -- I am sorry -- that the defendant had the intent to commit the crime charged in this case, and the lack of consent. If you believe this evidence, you may consider it but only for the limited purpose or purposes for which it was received.

Mack continued: "[Defendant] would either make me give him oral sex or he would continue to insert his penis inside of me." Mack did not consent to these encounters, but she did not scream because her "kids were in the room just ten feet away." Mack explained she had been unable to resist Defendant's sexual advances during their past relationship.

¶ 10 Defendant did not present any evidence at trial. Before the trial court sent the jury to deliberate, the trial court instructed the jury:

> Evidence was [presented] tending to show that at an earlier time the defendant sexually assaulted Brittany Mack. This evidence was received solely for the purpose of showing absence of mistake and/or that the defendant had the intent to commit the crime charged in this case. If you believe this evidence, you may consider it, but only for the limited purpose or purposes for which it was received.

During deliberation, the jury asked the trial court: "In the third element, can you please explain in detail should have reasonably known?" The trial court instructed the jury that it was "to consider what a reasonable person similarly situated would have known or should have known." After the jury informed the trial court that it could not reach a unanimous verdict, the trial court issued the jury an Allen charge instructing the jury to continue to deliberate. The jury eventually found Defendant "guilty of second degree rape." The trial court sentenced Defendant to an active term of 96 to 176 months—including the charge of Incest to which Defendant pled guilty. Defendant gave oral Notice of Appeal in open court.

Issues

¶ 11 The issues on appeal are whether the trial court: (I) erred in allowing testimony regarding Defendant's alleged prior rapes because the alleged prior rapes were not relevant to any material element of the charge of Second-Degree Forcible Rape in this case; and (II) abused its discretion in weighing the testimony's prejudicial effect against its probative value.

Analysis

¶ 12 Defendant argues the trial court erred in admitting Mack's testimony regarding Defendant's alleged forcible rapes against her will because these alleged prior rapes were not relevant under Rule of Evidence 401 as they were not probative of any fact required to find Defendant committed Second-Degree Forcible Rape in this case. Alternatively, Defendant argues the trial court abused its discretion in weighing the probative value of Mack's testimony against its prejudicial effect pursuant to Rule of Evidence 403.

I. Relevant Evidence

¶ 13 **[1]** As a threshold matter, the State contends Defendant has not preserved this specific theory for appeal because Defendant only objected

to this testimony at trial under Rule of Evidence 404(b) as impermissible character evidence showing Defendant's propensity to commit rape. As such, according to the State, Defendant has not preserved the issue on the specific grounds the testimony was relevant pursuant to Rule 401. Thus, the State argues Defendant may only challenge this alleged error under a plain error standard of review.

¶ 14 Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake [.]

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). " 'In fact, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue* other than the character of the accused.' " *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). When determining whether to admit evidence under Rule 404(b), the trial court must determine: (1) if the evidence is being offered for the purposes expressed in the Rule; and (2) whether the evidence is relevant. *State v. Bynum*, 111 N.C. App. 845, 848, 433 S.E.2d 778, 780, *cert. denied*, 335 N.C. 239, 439 S.E.2d 153 (1993). Thus, our courts have reasoned a determination of relevance under Rule 401 is likely subsumed in a trial court's decision to admit or exclude evidence under Rule 404(b). However, even assuming Defendant's Motion to exclude this testimony pursuant to Rule 404(b) preserved his argument on appeal pursuant to Rule 401, the trial court did not err in concluding the testimony was relevant for the following reasons.

¶ 15 Defendant contends testimony regarding the alleged forcible rapes against Mack were not relevant to this case where the State only had to prove K.F. was physically helpless, and Defendant knew or should have reasonably known K.F. was physically helpless. Therefore, according to Defendant, Mack's testimony was "wholly unrelated" to the facts and allegations in this case. Rule 401 defines relevant evidence as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of

discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570, *appeal dismissed*, *rev. denied*, 373 N.C. 175, 833 S.E.2d 806 (2019) (citation and quotation marks omitted).

¶ 16 Defendant was indicted on one count of Second-Degree Forcible Rape where the Grand Jury found Defendant "engage[d] in vaginal intercourse with [K.F.], who was at the time physically helpless" in violation of N.C. Gen. Stat. § 14-27.22. N.C. Gen. Stat. § 14-27.22(a) provides:

> A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.22(a) (2019). Thus, the statute provides two distinct avenues to prosecute a defendant: for acts committed by force and against the victim's will; or acts committed against a victim who cannot express unwillingness. However:

> The gravamen of the offense of second degree rape is forcible sexual intercourse. N.C. Gen. Stat. § 14–27.3 (2005). Force may be shown in several alternative ways including: (1) actual force, *State v. Hall*, 293 N.C. 559, 562-63, 238 S.E.2d 473, 475 (1977) (defendant grabbed victim's neck and pushed her onto the bed); (2) constructive force, *State v. Parks*, 96 N.C. App. 589, 594, 386 S.E.2d 748, 752 (1989) ("threats and displays of force by defendant for the purpose of compelling the victim's submission to sexual intercourse"); and (3) force implied in law, which includes sexual intercourse with a person who is mentally incapacitated, *State v. Washington*, 131 N.C. App. 156, 167, 506 S.E.2d 283, 290 (1998) ("[O]ne who is mentally defective under the sex offense laws is statutorily deemed incapable of consenting to

> intercourse or other sexual acts. . . . [F]orce is inherent to having sexual intercourse with a person who is deemed by law to be unable to consent." (Citations and quotation marks omitted.)), *disc. review denied and appeal dismissed*, 350 N.C. 105, 533 S.E.2d 477-78 (1999), sleeping, *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987) ("[S]exual intercourse with [a sleeping] victim is *ipso facto* rape because the force and lack of consent are implied in law."), or physically helpless, *State v. Aiken*, 73 N.C. App. 487, 499, 326 S.E.2d 919, 926 ("The physical act of vaginal intercourse with the victim while she is physically helpless is sufficient 'force' for the purpose of second degree rape[.]"), *disc. review denied and appeal dismissed*, 313 N.C. 604, 332 S.E.2d 180 (1985).

State v. Haddock, 191 N.C. App. 474, 480-81, 664 S.E.2d 339, 344-45 (2008).[2]

¶ 17 Therefore, when the State proceeds on a theory the victim was physically helpless, force and lack of consent are implied by law. Thus, at the very least, any mistake as to the victim's consent is relevant to a charge of Second-Degree Rape under such a theory.

¶ 18 Here, the State's theory of the case rested on the fact that K.F. was physically helpless against Defendant's actions. The trial court warned the jury it could only consider Mack's testimony for the purposes of proving intent, consent, and absence of mistake. The trial court again instructed the jury it could only consider Mack's testimony for the purposes of intent and absence of mistake before the jury deliberated. Because force and consent are relevant issues in any Second-Degree Forcible Rape case, the absence of any mistake as to consent was an

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2. Applying N.C. Gen. Stat. § 14-27.3 which provided:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3 (2005). In 2015, the General Assembly recodified N.C. Gen. Stat. § 14-27.3 as N.C. Gen. Stat. § 14-27.22. An Act To Reorganize, Rename, and Renumber Various Sexual Offenses . . . S.L. 2015-181, § 4(b), 2015 N.C. Sess. Laws 151, 461.

issue relevant to this case. Although the force involved in the alleged rapes to which Mack testified was not the same as the force implied by law in this case, it was relevant to prove Defendant did not mistake K.F.'s actions and inactions as consent in this case where he had allegedly raped Mack by force and without her consent previously. *See id.* at 481, 664 S.E.2d at 345 ("mental incapacity and physical helplessness are but two alternative means by which the force necessary to complete a rape may be shown"). Consequently, the trial court did not err in determining Mack's testimony was relevant pursuant to Rule 401.

II. Abuse of Discretion

¶ 19 **[2]** Defendant further argues, alternatively, the trial court abused its discretion "by improperly applying the Rule 403 balancing test" weighing the probative value of Mack's testimony against the danger of unfair prejudice. "[C]ases decided by [the North Carolina Supreme Court] under Rule 404(b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exceptio*n requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense[.]" *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

¶ 20 After determining evidence is offered for a proper purpose and is relevant under Rule 404(b), the trial court must balance the evidence's probative value against its prejudicial effect pursuant to Rule 403. *Bynum*, 111 N.C. App. at 848-49, 433 S.E.2d at 780 (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2019). "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citation and quotation marks omitted). We review a trial court's decision to admit or exclude evidence under Rule 403 for an abuse of discretion. *Bynum*, 111 N.C. App. at 849, 433 S.E.2d at 781 (citation omitted). The trial court abuses its discretion where its ruling "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002) (citation and quotation marks omitted).

¶ 21 Here, the trial court heard Defendant's pre-trial arguments on his Motion *in Limine* to exclude Mack's testimony. The trial court heard Mack testify on *voir dire* and could forecast the nature of Mack's testimony before Mack testified in front of the jury. The trial court acknowledged Rule 404(b) was a rule of inclusion and that "[Mack's testimony]

was sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test and that the probative value is not outweighed by the prejudicial effect." The trial court limited Mack's testimony to the "purposes of showing absence of mistake, lack of consent and intent." Therefore, the trial court's decision to admit Mack's testimony was the result of a reasoned decision where the trial court heard the testimony on *voir dire*, limited the purpose of the testimony, and acknowledged the testimony's prejudicial effect while conducting the balancing test. Consequently, the trial court did not abuse its discretion.

Conclusion

¶ 22 Accordingly, for the foregoing reasons, there was no error at trial, and we affirm the Judgment.

NO ERROR.

Judges INMAN and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JOSEPH DONALD ROYSTER, III, DEFENDANT

No. COA20-170

Filed 2 November 2021

Search and Seizure—investigatory stop—totality of circumstances—anonymous tip—evasive action—school property

The totality of the circumstances provided law enforcement officers with reasonable articulable suspicion to perform an investigatory stop on defendant where an anonymous caller had reported that a person matching defendant's description had heroin and a gun in his vehicle on school property; officers confirmed the details provided by the anonymous caller; a criminal database search revealed that defendant had a history of drug charges and a firearm charge; and defendant turned off and locked his car when an officer called his name, walked away from the officer, and reached for his waistband.

Appeal by Defendant from judgment entered 30 October 2019 by Judge Casey Viser in Forsyth County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Robert J. Pickett, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

MURPHY, Judge.

¶ 1 Before law enforcement officers may perform an investigatory stop on someone without a warrant, the United States Constitution and North Carolina Constitution require that they have reasonable articulable suspicion that criminal activity is afoot. Reasonable articulable suspicion can arise through an anonymous tip if the tip has sufficient indicia of reliability and suggests criminal activity is afoot. Reasonable articulable suspicion may also exist where the totality of the circumstances suggests criminal activity is afoot. Evidence that is illegally obtained as a result of an unconstitutional stop without reasonable articulable suspicion must be suppressed. Here, the totality of the circumstances indicated Defendant unlawfully possessed a weapon, providing law enforcement with reasonable articulable suspicion to stop Defendant. As a result, the stop was constitutional and the trial court did not err in denying Defendant's motion to suppress.

BACKGROUND

¶ 2 On 2 January 2018, a grand jury indicted Defendant Joseph Donald Royster III for possession of a firearm by a felon; trafficking opium or heroin by possession; trafficking cocaine by possession; manufacturing, selling, delivering, or possessing a controlled substance within 1,000 feet of a school; possession of a weapon on school property; possession with intent to sell or deliver cocaine; possession with intent to sell or deliver heroin; and attaining the status of habitual felon. On 29 May 2018, Defendant filed a *Motion to Suppress Evidence*, arguing law enforcement did not have reasonable articulable suspicion to stop Defendant and the trial court should suppress the evidence that was subsequently discovered as a result of the stop. A hearing on the motion to suppress was held on 7 December 2018, and the trial court denied the motion in its *Order Denying Motion to Suppress* ("Order"), filed on 9 October

2019. The Order included the following findings of facts, which are unchallenged on appeal[1]:

> 1. On [2 January 2018], [Defendant] was indicted by a grand jury on charges of: possession of a weapon on school property, possession of cocaine with intent to sell and deliver, and possession of heroin with intent to sell and deliver.
>
> 2. [] Defendant was arrested on [16 September 2017], after officers found him in possession of a firearm, heroin and cocaine on school property.
>
> 3. Earlier that day, the Winston-Salem Police Department . . . received a detailed anonymous report . . . from a caller who stated that a black male named Joseph Royster, who goes by "Gooney," had heroin and a gun in his vehicle, which the caller described as a black Chevrolet Impala with [a specified] license plate number [].
>
> 4. The caller described the black male as wearing a white T-shirt and blue jeans, with gold teeth and a gold necklace. The caller also reported that the heroin and the gun were located in the armrest of the black Chevrolet Impala, which was parked near the premises of South Fork Elementary School . . . .
>
> 5. Based on [the] anonymous report, several officers from the Department responded to the scene at South Fork Elementary, including: Sgt. Ryan Phillips, Officer C.I. Penn, Officer Harrison, and Officer Robertson.
>
> 6. Sgt. Phillips is a patrol [s]upervisor with more than 13 years of experience with the Department, including S.W.A.T., who also previously served as a New York City Police Officer. He has participated in 300-400 drug crime investigations, and participated in 75-100 arrests.

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1. We note that Defendant explicitly concedes Findings of Fact 3-9 and 11-21 "were supported by the evidence at the suppression hearing[.]" He does not address Findings of Fact 1, 2, or 10, as he only made this statement regarding the "pertinent findings of fact[.]" These unchallenged findings of fact are also binding on appeal. *See State v. Warren*, 242 N.C. App. 496, 498, 775 S.E.2d 362, 364 (2015) (marks omitted) ("Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal."), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016), *cert. denied*, 196 L. Ed. 2d 261 (2016).

7. As the supervising officer on duty, Sgt. Phillips responded first to the call.

8. After receiving the anonymous report on [16 September 2017], and prior to arriving at South Fork Elementary, Sgt. Phillips searched the Department's database, the PISTOL database, for information on [Defendant].

9. Through the PISTOL database, Sgt. Phillips found a picture of [Defendant], which showed him as a black male with gold teeth. The PISTOL database also showed that [Defendant] had a history of drug charges, and a charge for possession of a firearm by a felon.

10. South Fork Elementary is a school located in Forsyth County, North Carolina.

11. When Sgt. Phillips arrived at South Fork Elementary, he exited his vehicle on foot and located a black Chevrolet Impala with the [specified] license plate number [], as described in the anonymous report, backed into a parking spot near the school. A youth football game was in progress at the school.

12. The black Chevrolet Impala was not occupied at the time, and Sgt. Phillips positioned himself approximately 40-50 yards from the black Chevrolet Impala to watch for anyone who approached the vehicle.

13. Meanwhile, as Sgt. Phillips located the Impala, Officer Penn and his supervising officer accompanying him in his vehicle, Officer Robertson, met with Officer Harrison, who was in a separate vehicle.

14. Officer Penn retrieved the same information through the PISTOL database that Sgt. Phillips retrieved, and also verified [Defendant's] identity through his picture in the database.

15. Officers Penn and Robertson, and Officer Harrison, positioned themselves across the street, waiting for instructions from Sgt. Phillips.

16. As Sgt. Phillips watched the black Chevrolet Impala, a black male wearing a white T-shirt and

blue jeans with a gold necklace and gold teeth -- matching the description in the anonymous report -- approached the black Chevrolet Impala and opened the door. Sgt. Phillips then radioed for the other officers to join him on the scene as the black male was getting into the black Chevrolet Impala.

17. Sgt. Phillips then approached the black Chevrolet Impala, and as he did so the black male exited the vehicle. While the black male was standing next to the black Chevrolet Impala, Sgt. Phillips called out [Defendant's] name, whereupon the black male turned around and looked at Sgt. Phillips. The black male then reached inside the black Chevrolet Impala, turned the vehicle off, and shut the door.

18. The black male then began walking away as Sgt. Phillips walked toward him. With his back to Sgt. Phillips, the black male reached for his waistband.

19. Sgt. Phillips warned the black male, "Don't be reaching for your waistband."

20. Based on Sgt. Phillips' training and experience, in addition to the anonymous report that was received and the other corroborated information obtained by Sgt. Phillips regarding prior charges against [Defendant], Sgt. Phillips suspected the potential presence of a firearm.

21. The black male, who Sgt. Phillips identified as [Defendant], was anxious, upset, and "antsy." Sgt. Phillips and Officer Harrison frisked [Defendant] for weapons for the safety of the officers, and informed [Defendant] they were detaining him for a narcotics investigation.

¶ 3 The Order included the following conclusions of law:

1. The [trial court] has jurisdiction over [] Defendant and the subject matter[.]

2. Based on the totality of [the] circumstances, including the detailed anonymous report and the information contained therein that was corroborated by Sgt. Phillips and the other officers, Sgt. Phillips' training

> and experience in investigating drug crimes, and [] Defendant's turning and walking away from the officers upon making eye contact with Sgt. Phillips and then reaching for his waistband, the officers had reasonable suspicion to conduct an investigatory stop of Defendant.
>
> 3. As a result, Defendant's Motion to Suppress based on lack of reasonable suspicion for the stop should be denied.

¶ 4 Defendant pled guilty to all charges on 30 October 2019, reserved his right to appeal the denial of his motion to suppress, and subsequently gave notice of appeal in open court. The trial court sentenced Defendant to an active term of 76-104 months.

ANALYSIS

¶ 5 On appeal, Defendant contends the trial court erred by denying his motion to suppress as "[t]he officers could not lawfully conduct an investigatory stop of [Defendant] without a reasonable articulable suspicion of criminal activity." Defendant contends this rendered the stop illegal and the evidence resulting from it should have been suppressed under the fruit of the poisonous tree doctrine, requiring us to reverse the Order and vacate his convictions premised upon his guilty plea. As noted above, Defendant does not challenge any findings of fact in the Order and instead challenges only the conclusions of law reached by the trial court.

¶ 6 Review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review." *Warren*, 242 N.C. App. at 498, 775 S.E.2d at 364 (marks omitted).

A. Reasonable Articulable Suspicion

¶ 7 The trial court based Conclusion of Law 2, that reasonable articulable suspicion existed for the stop, on

> the totality of [the] circumstances, including the detailed anonymous report and the information

> contained therein that was corroborated by Sgt. Phillips and the other officers, Sgt. Phillips' training and experience in investigating drug crimes, and [] Defendant's turning and walking away from the officers upon making eye contact with Sgt. Phillips and then reaching for his waistband[.]

Although not explicitly discussed in Conclusion of Law 2, the totality of the circumstances here also includes Defendant's PISTOL database records,[2] which showed Defendant's prior drug charges and a prior firearm charge.

¶ 8 The United States and North Carolina Constitutions protect persons from "unreasonable searches and seizures[.]" U.S. Const. amend. IV; N.C. Const. art. 1, § 20.

> Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.

State v. Hendricks, 43 N.C. App. 245, 251-52, 258 S.E.2d 872, 877 (1979), *disc. rev. denied*, 299 N.C. 123, 262 S.E.2d 6 (1980). "In analyzing what constitutes a reasonable seizure, the United States Supreme Court has consistently held that a police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may *be underway*." *State v. Horton*, 264 N.C. App. 711, 715, 826 S.E.2d 770, 773 (2019) (emphasis added) (marks omitted). "Under the reasonable articulable suspicion standard, a stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Harwood*, 221 N.C. App. 451, 458, 727 S.E.2d 891, 898 (2012) (marks omitted). "For that reason, there must be a minimal level of objective justification, something more than an unparticularized suspicion or hunch to justify an investigative detention." *Id.* (marks and citations omitted). "A court

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2. At the motion to suppress hearing, testimony described the PISTOL database as a searchable police database that provides a person's information, comprised of, in part, their fifteen most recent contacts with law enforcement, including charges.

must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

1. The Anonymous Call

¶ 9 Defendant argues the anonymous call did not demonstrate reliability and, instead, merely described identifying characteristics. The State argues the anonymous call was sufficiently reliable since it was made by phone, identified a specific person with whom the anonymous caller had some demonstrated familiarity, and provided his real-time location.

¶ 10 "Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights." *State v. Johnson*, 204 N.C. App. 259, 263, 693 S.E.2d 711, 715 (2010) (citing *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983)). "If the anonymous tip does not have sufficient indicia of reliability, then there must be sufficient police corroboration of the tip before the stop may be made." *Harwood*, 221 N.C. App. at 459, 727 S.E.2d at 898. "As a result, we must determine (1) whether the anonymous tip provided to [the police], taken as a whole, possessed sufficient indicia of reliability and, if not, (2) whether the anonymous tip could be made sufficiently reliable by independent corroboration in order to uphold the challenged investigative detention." *Id.*; *see also Horton*, 264 N.C. App. at 717, 826 S.E.2d at 775 (quoting *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000)) ("Indices of reliability can come in two forms: (1) the tip itself provides enough detail and information to establish reasonable suspicion, or (2) though the tip lacks independent reliability, it is 'buttressed by sufficient police corroboration.' ").

> The type of detail provided in the tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, . . . confirmation of these details will not legitimize the tip.

Johnson, 204 N.C. App. at 264, 693 S.E.2d at 715. Additionally,

> an accurate description of a subject's readily observable location and appearance is of course reliable in

> [a] limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Hughes, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *Florida v. J.L.*, 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000)). Based on this caselaw, we have found an anonymous tip was insufficient when the caller only "provided identifying information concerning a black male suspect wearing a white shirt in a blue Mitsubishi with a certain license plate number[]" who was selling drugs and guns at a precise location. *Johnson*, 204 N.C. App. at 264, 693 S.E.2d at 715-16.

¶ 11 The Order's Findings of Fact 3 and 4 described the anonymous call as follows:

> 3. . . . [T]he Winston-Salem Police Department . . . received a detailed anonymous report . . . from a caller who stated that a black male named Joseph Royster, who goes by "Gooney," had heroin and a gun in his vehicle, which the caller described as a black Chevrolet Impala with [a specified] license plate number [].
>
> 4. The caller described the black male as wearing a white T-shirt and blue jeans, with gold teeth and a gold necklace. The caller also reported that the heroin and the gun were located in the armrest of the black Chevrolet Impala, which was parked near the premises of South Fork Elementary School . . . .

¶ 12 The anonymous call here was "reliable in [a] limited sense" in providing details that identified Defendant and his car, which were confirmed by Sergeant Phillips. *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632. "The record contains no information about who the caller was, no details about what the caller had seen, and no information even as to where the caller was located." *State v. Peele*, 196 N.C. App. 668, 673, 675 S.E.2d 682, 686, *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 383 (2009). "[W]hile the tip at issue included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator."

Johnson, 204 N.C. App. at 263, 693 S.E.2d at 714-15. As a result, by merely providing identifying information, "there was nothing inherent in the tip itself to allow [the trial] court to deem it reliable and to provide the officers with the reasonable suspicion necessary to effectuate a stop." *Id.* at 264-65, 693 S.E.2d at 716. Even assuming all the identifying details of the anonymous call were corroborated, the call and corroboration alone did not provide the officers with reasonable articulable suspicion that criminal activity was afoot as no details regarding criminal activity were corroborated prior to Defendant's seizure. *See id.* at 264, 693 S.E.2d at 715 ("Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.").

¶ 13 The State argues the anonymous caller's use of a phone to make the tip bolsters the reliability of the anonymous tip. The State relies on *Navarette v. California*, where the United States Supreme Court found an anonymous caller's use of the 911 emergency system was "one of [several] relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." *Navarette v. California*, 572 U.S. 393, 401, 188 L. Ed. 2d 680, 689 (2014). Although the United States Supreme Court stated it was not suggesting "tips in 911 calls are *per se* reliable[,]" the Court held "[g]iven the foregoing technological and regulatory developments, . . . a reasonable officer could conclude that a false tipster would think twice before using such a system." *Id.* However, both parties here recognize it is unclear whether the anonymous caller contacted 911 or a non-emergency number, and there is no finding of fact by the trial court on this issue. Further, there is no evidence or finding of fact concerning whether the anonymous caller may have preserved her anonymity, such as by using a public phone. Finally, while there were other circumstances in *Navarette* suggesting reliability as to the criminal conduct, here there were not. *Id.* at 400-01, 188 L. Ed. 2d at 688. The reasoning from *Navarette* is inapplicable.

¶ 14 Additionally, the State argues the inclusion of Defendant's nickname in the anonymous tip may show the caller's familiarity with Defendant.[3] The State relies on caselaw regarding relevance that held a witness's testimony regarding a defendant's name that "[a]ll they call them (sic) was 'Spook[,]' [t]hat's all I knowed for a long time[]" was not

3. We note that while there was testimony that Defendant's nickname was in the PISTOL database, there was no evidence showing Sergeant Phillips, who stopped and seized Defendant, was aware of Defendant's nickname in the PISTOL database or otherwise. Additionally, the Order contains no findings of fact on this issue.

inadmissible evidence of bad character, since the testimony "was relevant to show the witness's acquaintance and familiarity with the defendant." *State v. Barnett*, 41 N.C. App. 171, 173-74, 254 S.E.2d 199, 200-01 (1979). In the context of the opinion's full analysis, it is not clear that *Barnett* was holding that the use of a nickname, rather than the use of the nickname in the context of the specific witness's testimony, shows acquaintance and familiarity. *Id.* However, even assuming *Barnett* did hold this, it was in the context of the relevance of evidence. *Id.* It is well established that the rules regarding relevance are permissive and favor admission. *See, e.g.*, *State v. Kowalski*, 270 N.C. App. 121, 127, 839 S.E.2d 443, 447 (2020) (emphases added) (citation and marks omitted) ("Relevant evidence is defined as evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence, as a general matter, is considered to be admissible. *Any evidence calculated to throw light upon the crime charged should be admitted by the trial court.*"). Our prior ruling in *Barnett* regarding the use of someone's nickname being at least minimally relevant is a far different context from the use of nicknames in an anonymous tip to provide reasonable articulable suspicion. *See Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990) ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity . . . ."). We decline to blend the two.

¶ 15 Additionally, the State fails to show how the caller knowing Defendant's nickname suggests the caller had any more familiarity with Defendant than she did by virtue of knowing his name, especially in the absence of any evidence indicating how common it was for Defendant to be referred to by his nickname. Even assuming, *arguendo*, that Sergeant Phillips had confirmed Defendant's nickname prior to seizing Defendant, there is no reason to conclude Defendant's nickname should be treated any differently than his name. Accordingly, we treat Defendant's nickname as additional identifying information, which does not make the anonymous call more "reliable in its assertion of illegality[.]" *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632.

¶ 16 The anonymous call identifying Defendant and suggesting there was a firearm and heroin within his vehicle alone was insufficient to provide Sergeant Phillips with reasonable articulable suspicion.

2. Totality of the Circumstances

¶ 17 However, "[a] court must consider the totality of the circumstances —the whole picture in determining whether a reasonable suspicion to

make an investigatory stop exists." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (marks omitted). Here, when considering the totality of the circumstances prior to Defendant's stop, law enforcement had reasonable articulable suspicion that criminal activity was afoot.

¶ 18 In *State v. Malachi*, we held an anonymous tip alone was insufficient to supply law enforcement with reasonable articulable suspicion, but ultimately found reasonable articulable suspicion after looking at the totality of the circumstances. *State v. Malachi*, 264 N.C. App. 233, 237-39, 825 S.E.2d 666, 669-71, *appeal dismissed*, 372 N.C. 702, 830 S.E.2d 830 (2019). We based our conclusion regarding the existence of reasonable articulable suspicion, in part, on the defendant making eye contact with the uniformed police officer, then turning and "blading," and moving away from the officers as they approached. *Id.* at 239, 825 S.E.2d at 671. As in *Malachi*, here there was reasonable articulable suspicion based on the totality of the circumstances.

¶ 19 Similar to the facts of *Malachi*, Sergeant Phillips' testimony and the trial court's findings of fact describe the following chain of events: before Defendant noticed Sergeant Phillips, Defendant got into the car; as Sergeant Phillips approached, but was not yet seen, Defendant exited the vehicle; Sergeant Phillips addressed Defendant by name and, upon seeing Sergeant Phillips, Defendant reached back into the car, turned it off, and locked it;[4] and Defendant then began walking away from Sergeant Phillips and reached for his waistband. Considering prior holdings regarding a defendant's evasive behavior being a factor supporting reasonable articulable suspicion, we conclude this evidence supports finding reasonable articulable suspicion existed for the stop. *See*, *e.g.*, *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (finding reasonable articulable suspicion existed in part based on evidence that "upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight"); *Malachi*, 264 N.C. App. at 237-39, 825 S.E.2d at 669-71; *State v. Garcia*, 197 N.C. App. 522, 529, 677 S.E.2d 555, 559 (2009) ("Factors to determine whether reasonable suspicion existed include . . . unprovoked flight."); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) ("[W]hen an individual's presence at a suspected drug area is *coupled* with evasive

4. Although the Order does not indicate that Defendant locked the door, the evidence at trial unequivocally does. *See State v. Johnson*, 2021-NCSC-85, ¶ 12 (marks omitted) ("[W]hen there is no conflict in the evidence, an appellate court may infer a trial court's findings in support of its decision on a motion to suppress so long as that unconflicted evidence was within the trial court's contemplation.").

actions, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop.").

¶ 20 Defendant cites *State v. Fleming* to support his argument that we cannot rely upon his reaction to the police to support a finding of reasonable articulable suspicion. *See State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). *Fleming* involved two men standing between two apartment buildings. *Id.* at 170, 415 S.E.2d at 785. The two men saw the officers but initially remained in the area talking, and an officer subsequently noticed the men walking out of the open area toward the street and down a public sidewalk, where they were stopped. *Id.* at 170-71, 415 S.E.2d at 785. We found no reasonable articulable suspicion existed as there was only "a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that [the] defendant was unfamiliar to the area." *Id.* at 171, 415 S.E.2d at 785.

¶ 21 Additionally, Defendant cites *In re J.L.B.M.* to support his contention that "an individual's walking away from officers has been held not to give rise to reasonable suspicion absent other evidence that he was engaged in a crime." *See In re J.L.B.M.*, 176 N.C. App. 613, 627 S.E.2d 239 (2006). *In re J.L.B.M.* involved the stop and frisk of a juvenile after a police dispatch regarding a "suspicious person." *Id.* at 616, 627 S.E.2d at 241. We described the additional facts as follows:

> [The police officer] saw a person in the gas station parking lot, later identified as the juvenile, who fit the description of the person. When the juvenile saw [the police officer], he walked over to a vehicle in the parking lot, spoke to someone, and then began walking away from [the police officer's] patrol car. [The police officer] pulled up beside the juvenile in an adjoining restaurant parking lot and stopped the juvenile.

Id. We noted the police dispatch merely stated the juvenile was a "suspicious person" but there was no allegation that he was engaged in any criminal activity. *Id.* at 620, 627 S.E.2d at 244. "There was no approximate age, height, weight or other physical characteristics given as part of the description, nor was there a description of any specific clothing worn by the suspicious person." *Id.* We found the officer only had a "generalized suspicion" and the stop was unjustified since

> [the police officer] relied solely on the dispatch that there was a suspicious person at the Exxon gas

> station, that the juvenile matched the "Hispanic male" description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. [The police officer] was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile's pocket after he stopped the juvenile.

Id. at 622, 627 S.E.2d at 245.

¶ 22 At the outset, we note that the circumstances in the cases relied upon by Defendant are distinct from the circumstances here in that law enforcement officers had received a specified allegation of criminal activity that informed their interactions with Defendant. In addition to the anonymous caller's allegation that Defendant was in possession of controlled substances, there was also an allegation that he was in possession of a firearm. In conjunction with Defendant's presence on school property and his prior charge of felon in possession of a firearm, if law enforcement officers had reasonable articulable suspicion that Defendant was in possession of a firearm, then they had reasonable articulable suspicion he was violating statutes prohibiting the possession of a firearm on school property and the possession of a firearm by a felon. *See* N.C.G.S. § 14-269.2(b) (2019) ("It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school."); N.C.G.S. § 14-415.1(a) (2019) ("It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . . Every person violating the provisions of this section shall be punished as a Class G felon.").

¶ 23 Additionally, in terms of evasive action, Defendant's actions here show a stronger indication of an altered course of action than the actions of the defendants in *Fleming* and the juvenile in *In re J.L.B.M.* since Defendant's actions here were an immediate reaction to seeing Sergeant Phillips. Rather than simply walking away from Sergeant Phillips, like the defendants in *Fleming* and the juvenile in *In re J.L.B.M.*, Defendant changed his immediate course of action in response to Sergeant Phillips' presence by turning off the car Defendant had just started, closing and locking the car door, and walking away from the car and Sergeant Phillips. We have held similar behavior to be evasive action. *See Malachi*, 264 N.C. App. at 239, 825 S.E.2d at 671 (emphasis added) ("Given [the] [d]efendant's 'blading' after making eye contact with [the arresting

officer] in his marked car and uniform, *[the] [d]efendant's movements away from [the arresting officer] as he was being approached*, [the arresting officer's] training in identifying armed suspects, and [the] [d]efendant's failure to comply with [N.C.G.S. §] 14-415.11(a) when approached by the officers, we hold that the officers had reasonable suspicion under the totality of the circumstances to conduct an investigatory stop of [the] [d]efendant in response to the tip identifying him as possessing a firearm at the gas station.").

¶ 24 Further, Defendant's PISTOL database records showed that he had prior drug charges and a prior firearm charge. *Johnson*, a recent case decided by our Supreme Court, is instructive to the import of this evidence. *See generally Johnson*, 2021-NCSC-85. In *Johnson*,

> the unconflicted evidence introduced by the State at the hearing conducted by the trial court on [the] defendant's motion to suppress—that (1) the traffic stop occurred late at night (2) in a high-crime area, with (3) [the] defendant appearing "very nervous" to the detaining officer to the point that it "seemed like his heart was beating out of his chest a little bit," with (4) [the] defendant "blading his body" as he accessed the Dodge Charger's center console, and *(5) [the] defendant's criminal record indicating a "trend in violent crime" and weapons-related charges*—was sufficient for the trial court to make findings of fact and conclusions of law that the investigating law enforcement officer had reasonable suspicion to conduct a *Terry* search of [the] defendant's person and in areas of [the] defendant's vehicle under [the] defendant's immediate control for the officer's safety.

Id. at ¶ 15 (emphasis added). Our Supreme Court relied on the officer's knowledge of the defendant's charges based on CJLEADS[5] database records, in part, to conclude the totality of circumstances created a reasonable articulable suspicion that the defendant was potentially armed and dangerous, justifying the *Terry* search. *Id.* at ¶¶ 4, 15, 18.

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5. We note that the CJLEADS database is "a database which details a person's history of contacts with law enforcement in the form of a list of criminal charges filed against the individual[.]" *Id.* at ¶ 4. Here, at the motion to suppress hearing, testimony described the PISTOL database as searchable police database that provides a person's information, comprised of, in part, their fifteen most recent contacts with law enforcement, including charges. For the purposes of this appeal, there is no relevant distinction between the use of the CJLEADS database in *Johnson* and the use of the PISTOL database here.

¶ 25 Here, like in *Johnson*, Sergeant Phillips searched Defendant through the PISTOL database and discovered that Defendant had a history of drug charges and a firearm charge. Based on *Johnson*, Defendant's prior firearm charge is appropriately part of the inquiry into whether reasonable articulable suspicion existed to stop Defendant. *Id.*; *see also Garcia*, 197 N.C. App. at 530-31, 677 S.E.2d at 560 (relying in part on PISTOL database records to find reasonable articulable suspicion). Here, Defendant's PISTOL database records support the trial court's conclusion that reasonable articulable suspicion existed at the time of the stop.

¶ 26 Additionally, Defendant reached for his waistband while he was walking away from Sergeant Phillips. Finding of Fact 18 states:

> The black male then began walking away as Sgt. Phillips walked toward him. With his back to Sgt. Phillips, the black male reached for his waistband.

We have found similar movements to be relevant in finding reasonable articulable suspicion existed. *See State v. Sutton*, 232 N.C. App. 667, 682, 754 S.E.2d 464, 473 (considering, in part, that the defendant grabbed his waistband to clinch an item, which was interpreted as an attempt to conceal something, in concluding reasonable articulable suspicion existed), *disc. rev. denied*, 367 N.C. 507, 759 S.E.2d 91 (2014); *State v. Hamilton*, 125 N.C. App. 396, 401, 481 S.E.2d 98, 101 (finding a pat-down for weapons was justified because the defendant's "hand began to reach toward his left side[,]" which caused the officer to believe the defendant was reaching for a weapon), *disc. rev. denied and appeal dismissed*, 345 N.C. 757, 485 S.E.2d 302 (1997).

¶ 27 Finally, while the anonymous call did not provide reasonable articulable suspicion on its own, or as corroborated, it can be appropriately considered within the totality of the circumstances. *See Malachi*, 264 N.C. App. at 239, 825 S.E.2d at 671 (emphasis added) ("Given [the] [d]efendant's 'blading' after making eye contact with [the arresting officer] in his marked car and uniform, [the] [d]efendant's movements away from [the arresting officer] as he was being approached, [the arresting officer's] training in identifying armed suspects, and [the] [d]efendant's failure to comply with [N.C.G.S. §] 14-415.11(a) when approached by the officers, we hold that the officers had reasonable suspicion under the totality of the circumstances to conduct an investigatory stop of [the] [d]efendant *in response to the tip identifying him as possessing a firearm at the gas station*."). Defendant contends the anonymous tip did not support Defendant having access to a firearm because the firearm was allegedly located in the armrest of the car and

there was no testimony that Sergeant Phillips observed any movements consistent with retrieving the firearm. However, there is also evidence that Sergeant Phillips was forty to fifty yards away from the vehicle when Defendant first approached the vehicle, a distance where movements inside the vehicle could have gone unseen, and Defendant could have retrieved the alleged firearm between the time of the tip and when the law enforcement officers arrived. Although the anonymous tip was not corroborated as to the location of the firearm, it alleged that Defendant had access to a firearm in his car, which he had exited immediately prior to when he was stopped. In light of our caselaw and under these facts, it is appropriate to consider the impact of the anonymous call within the totality of circumstances to determine if law enforcement had a reasonable articulable suspicion that criminal activity was afoot. *See id.*

¶ 28 Altogether, Defendant's attempt to avoid Sergeant Phillips, Defendant's PISTOL database records reflecting a prior firearm charge, Defendant's action of reaching toward his waistband, and the anonymous call suggesting that Defendant potentially had access to a firearm created a reasonable articulable suspicion that Defendant was carrying a firearm. These objective circumstances, in conjunction with unchallenged Finding of Fact 2, which states Defendant was found and arrested "on school property," provided Sergeant Phillips with reasonable articulable suspicion that Defendant was unlawfully in possession of a firearm on school property. *See* N.C.G.S. § 14-269.2(b) (2019) ("It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school.").

¶ 29 Based on the unchallenged findings of fact, the trial court's conclusion of law that Sergeant Phillips had a reasonable articulable suspicion for the stop was proper, as there was reasonable articulable suspicion that Defendant unlawfully possessed a firearm on school property.[6]

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6. Defendant does not challenge whether there was a proper basis for law enforcement officers to search his vehicle after they stopped him outside his vehicle and a frisk of Defendant revealed nothing improper on his person; Defendant has only challenged the constitutionality of the initial stop on appeal and did not challenge any other issue on appeal. *See* N.C. R. App. P. 28(a) (2021) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."); *see also State v. Miller*, 228 N.C. App. 496, 499 n.1, 746 S.E.2d 421, 424 n.1 (2013) ("The trial court also denied [the] defendant's motion to suppress with regard to the gun in his car and the marijuana found on the back steps. Specifically, the trial court concluded that [the] defendant was not in custody when he voluntarily told the officer about the gun in his vehicle. Moreover, the trial court held that the marijuana

CONCLUSION

¶ 30 The trial court did not err in concluding the initial investigatory seizure of Defendant was supported by reasonable articulable suspicion based on Defendant's previous criminal charges, an anonymous call suggesting Defendant was armed, Defendant's reaction to Sergeant Phillips' presence, and Defendant reaching for his waistband, in conjunction with Defendant's presence on school property. While none of these circumstances alone would satisfy constitutional requirements, when considered in their totality, these circumstances provided Sergeant Phillips with reasonable articulable suspicion to make a lawful stop. The trial court properly denied Defendant's motion to suppress.

NO ERROR.

Chief Judge STROUD and Judge COLLINS concur.

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on the back steps was in plain view. On appeal, [the] defendant does not challenge the denial of his motion to suppress with regard to these two pieces of evidence. Thus, these issues are deemed abandoned on appeal, N.C. R. App. P. 28(b)(6) (2012), and we will not determine whether the trial court erred in denying [the] defendant's motion to suppress with regard to them."), *rev'd on other grounds*, 367 N.C. 702, 766 S.E.2d 289 (2014).

Additionally, although Defendant's motion to suppress contended there was no probable cause to search his vehicle, Defendant expressly waived any additional basis to challenge the search of his vehicle at the motion to suppress hearing when Defense Counsel stated "on the motion, we were limiting it to the seizure, the stop of [] [D]efendant . . . ." This renders any other issue, including probable cause for the search of Defendant's vehicle, unpreserved on appeal. *See* N.C. R. App. P. 10(a)(1) (2021) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.").

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 NOVEMBER 2021)

COSWALLD, LLC v. NEW HANOVER CNTY. 2021-NCCOA-596 No. 21-37	New Hanover (20CVS1980)	Reversed and Remanded
DU PLESSIS v. DU PLESSIS 2021-NCCOA-597 No. 20-838	Mecklenburg (14CVD2288)	Reversed
GRIER v. ROUNDPOINT MORTG. SERVICING CORP. 2021-NCCOA-598 No. 20-866	Mecklenburg (18CVS24192)	DISMISSED IN PART; AFFIRMED IN PART.
IN RE EST. OF CHAMBERS 2021-NCCOA-599 No. 20-757	Iredell (18E729)	Affirmed
IN RE M.J. 2021-NCCOA-600 No. 21-263	Forsyth (20JA19)	VACATED AND REMANDED WITH INSTRUCTIONS.
IZMACO INVS., LLC v. ROYAL ROOFING & RESTORATION, LLC 2021-NCCOA-601 No. 21-62	Onslow (20CVS1030)	Dismissed
IZMACO INVS., LLC v. ROYAL ROOFING & RESTORATION, LLC 2021-NCCOA-602 No. 21-61	Onslow (20CVS1030)	APPEAL DISMISSED
MADISON ASPHALT, LLC v. MADISON CNTY. 2021-NCCOA-603 No. 21-115	Madison (19CVS340)	Dismissed
STATE v. CAMPBELL 2021-NCCOA-604 No. 20-902	Burke (19CRS50420) (20CRS156)	Vacated
STATE v. CODY 2021-NCCOA-605 No. 20-798	Wake (18CRS213534)	Dismissed

STATE v. FRENCH 2021-NCCOA-606 No. 20-767	Craven (18CRS51178)	Affirmed
STATE v. GIBBS 2021-NCCOA-607 No. 20-591	New Hanover (18CRS56870)	No Error in part; Reversed in part and Remanded.
STATE v. MASON 2021-NCCOA-608 No. 20-833	Wake (19CRS218)	Vacated and Remanded for New Disposition
STATE v. ROJAS 2021-NCCOA-609 No. 20-810	Gaston (16CRS55300)	Vacated and Remanded
STATE v. WHITE 2021-NCCOA-610 No. 20-893	Mecklenburg (17CRS223968) (17CRS223970)	No Error
EST. OF TANG v. N.C. DEP'T OF HEALTH & HUM. SERVS. 2021-NCCOA-611 No. 20-880	N.C. Industrial Commission (TA-21057)	Affirmed

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